

1 UNITED STATES DISTRICT COURT
 2 EASTERN DISTRICT OF NEW YORK

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4 BLUE CROSS and BLUE SHIELD : CV-98-3287
 5 Of NEW JERSEY, et al, :
 6 Plaintiffs, : United States Courthouse
 7 -against- : Brooklyn, New York
 8 :
 9 THE AMERICAN TOBACCO COMPANY;
 10 R. J. REYNOLDS TOBACCO COMPANY; :
 11 B.A.T INDUSTRIES, PLC; BROWN & : May 2, 2001
 12 WILLIAMSON TOBACCO CORPORATION; : 9:20 a.m.
 13 PHILIP MORRIS INCORPORATED;
 14 and LORILLARD TOBACCO COMPANY, :
 15 :
 16 Defendants.

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18 TRANSCRIPT OF TRIAL
 19 BEFORE THE HONORABLE JACK B. WEINSTEIN
 20 UNITED STATES DISTRICT JUDGE, and a jury

21 APPEARANCES:

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1 THE CLERK: Civil cause on trial, Blue Cross/Blue
2 Shield of New Jersey et al versus Phillip Morris Inc., et al.
3 MR. HEFTER: Your Honor, I do believe we have some
4 applications possibly but I know that Mr. Fitzpatrick and Mr.
5 Williams are in the hall so I'll have someone go get them.
6 THE COURT: All right.
7 (Pause.)
8 I'll be happy to hear you, counsel.
9 MR. FITZPATRICK: I'm sorry to delay you. I believe
10 we have worked out the issues that we raised with respect to
11 Professor Semenik.
12 Mr. Williams and I had a discussion, and subject to
13 confirmation later, I understand that Professor Semenik will
14 not be offering, please correct me if I'm wrong, will not be
15 offering testimony about the overall validity of the
16 deposition process.
17 He will give reasons why he coded things a particular
18 way or didn't code them a particular way that may touch on
19 some subjects such as social bias or whatever and I think that
20 that's acceptable to us if that's how it goes.
21 On the surveys, I understand that he will not testify
22 as to the result of his surveys but he will indicate that he
23 took surveys to tend to corroborate what he has seen in the
24 Gallup poles and if that's encapsulating the discussion that
25 we just had, if my understanding is correct, then we don't
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1 object.
2 THE COURT: That's correct.
3 MR. WILLIAMS: I think that we have worked this out
4 or can. This are 2 issues, one whether Dr. Semenik can give
5 opinions with respect to why he reached a different conclusion
6 from the subscriber depositions than Dr. Krosnick did and that
7 the plaintiffs did.
8 Some of these people were put into one category by
9 Dr. Krosnick, some were put into another category by Dr.
10 Semenik and he is simply going to explain how he reached
11 different conclusions than Dr. Krosnick.
12 Sometimes that will get into questions, leading
13 questions, loaded questions, suggestive questions, and I think
14 the plaintiffs agree that he can certainly do that. It might
15 touch on the issue of some sort of interview or bias or
16 acquiescence bias. On an individual basis he will indicate
17 why he got to that conclusion.
18 That leaves the other issue involving the work that
19 Dr. Semenik has done in other pieces of litigation. In both
20 the Mississippi case and the Texas Attorney General case, he
21 was asked to come in and do something similar to what happened
22 here but not identical.
23 What he did was a pole, a survey to understand why
24 people start to smoke and did advertising have any impact on
25 them.
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1 We in this case used the subscriber depositions and
2 not a pole and what he is simply going to say is this is the
3 first time he has seen depositions taken in a case in order to
4 determine what people thought about smoking and advertising.
5 He has not seen it before. He did it the other way in 2 other
6 cases. I am not going to ask him what the specific results
7 show but I will ask him if those results were consistent with

8 what he has seen in the Gallup poles and in Roper surveys and
9 whatever and he will give the opinion yes.
10 Then I will not ask him which one he considers to be
11 better, we will leave that for other experts and I think that
12 encapsulates our agreement.
13 MR. FITZPATRICK: Yes.
14 THE COURT: So that motion is withdrawn by
15 agreement.
16 This is an associate of law at Colombia and he is
17 going to be a professor other Suffolk law school. So better
18 watch out, he is watching you.
19 MR. WILLIAMS: We will welcome him.
20 THE COURT: And I have this letter on Empire
21 individual depositions. There is nothing I need to do about
22 that except file and docket it?
23 MR. FITZPATRICK: I think that's right.
24 MR. WILLIAMS: That's what we talked about
25 yesterday?
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1 MR. FITZPATRICK: Yes.
2 These are the ones that were actually -- these are
3 the transcript designations of what was actually presented to
4 the jury, your Honor.
5 THE COURT: We haven't put in these numbers on the
6 others, have we?
7 MR. FITZPATRICK: What we tried to do, your Honor,
8 is going back for all of the videos that we played so that we
9 have a record as to what the jury actually saw.
10 THE COURT: Are these -- is this the whole thing?
11 MR. FITZPATRICK: I'll have to let you know later,
12 your Honor. That is what it is supposed to be. What it is
13 supposed to be is which went through all the videos that were
14 played, then picked out the transcripts and actually indicated
15 which portions of the transcripts were played.
16 I will confirm later that we have a complete set.
17 THE COURT: Are there any questions on documents
18 coming up this morning?
19 MR. FITZPATRICK: I don't think we have.
20 THE COURT: We have a motion for judgment as a
21 matter of law this afternoon.
22 I have all the briefs?
23 MR. FITZPATRICK: We will be submitting a brief
24 before lunch, your Honor. I'm not sure how thorough it will
25 be given the time but we tried to cover it all.
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1 THE COURT: We have Empire's objection to 3
2 documents.
3 MR. GARNICK: That has been worked out.
4 THE COURT: Farone is finished now?
5 MR. FITZPATRICK: I think Mr. Bleakley would like
6 him to come back a few more times, but no, we are not going to
7 bring him back.
8 THE COURT: That motion is withdrawn?
9 MR. GARNICK: As far as I know, your Honor. I
10 haven't spoken to Mr. Bleakley.
11 THE COURT: Okay, motion denied as moot.
12 Now we have in addition to the big motions at 4:30,
13 we have the conspiracy motions. What do you want to do with
14 those? When did you want to argue that?

15 MR. FITZPATRICK: I had thought it would probably be
16 subsumed in what we do this afternoon.
17 THE COURT: Do it this afternoon, the conspiracy
18 motions?
19 MR. WILLIAMS: I think that is appropriate.
20 THE COURT: So that's all we have open, the
21 conspiracy motions and the motions to dismiss, right?
22 MR. GARNICK: Yes, your Honor.
23 I wanted to inform the Court what we are planning to
24 do this week.
25 When Dr. Whidby is finished, we plan on bringing in
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1 Dr. English who is a medical historian. He has patients he
2 has to see on Thursday so with agreement, we'll put on another
3 expert on Thursday and bring him back on Friday to finish up.
4 THE COURT: All right.
5 MR. FITZPATRICK: We also have an agreement because
6 of the tricky schedule here that we can begin our cross of Dr.
7 English on Monday. He is likely to take all or most of the
8 day Friday in any event.
9 THE COURT: Okay. Don't forget next Thursday is
10 half a day and Friday, we are out.
11 MR. GARNICK: Yes.
12 MR. WILLIAMS: Let me raise one thing, I haven't
13 raised it with Mr. Fitzpatrick yet so we may work it out but a
14 couple of times during the course of the trial so far there
15 have been suggestions made by the plaintiffs that by virtue of
16 questions we asked, we might have opened the door to the youth
17 targeting issue.
18 THE COURT: I'm against the theory of opening doors
19 so if you have an objection, raise it, otherwise I'm not going
20 to find that the door is opened.
21 MR. FITZPATRICK: We are not making any contention
22 that any doors have been opened.
23 MR. WILLIAMS: I wanted it clear what I'm going to
24 do with Dr. Semenik today. He is he is going to say that he
25 does not believe advertising causes people to smoke.
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1 There is a line of questions with respect to
2 adolescents as well based on the literature and I'm going to
3 ask him in the literature is there suggestion as to or is
4 there findings as to whether advertising causes adolescents to
5 smoke.
6 I don't think that comes close to opening the door.
7 THE COURT: That has been taken care of to a large
8 extent in these depositions. Everybody says they started to
9 smoke at 12 or 13 except the one that said she started to
10 smoke at 8.
11 MR. WILLIAMS: You've only seen a limited subsample
12 of this. Some stratification is going on on the scene.
13 MR. FITZPATRICK: I think Mr. Williams and I
14 understand the rules and I don't think that he is going beyond
15 the rules.
16 I would not contend that opens any doors.
17 THE COURT: So there is nothing else this morning.
18 We start at 10 to 10.
19 Thank you.
20 (Recess.)
21 (Continued on next page.)

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Whidby - Direct - Bleakley

1 (Jury in at 9:55 a.m.)
2 THE COURT: Good morning, everybody. Proceed,
3 please.
4 MR. BLEAKLEY: Yes, your Honor. We'll bring the
5 witness in.
6 J E R R Y W H I D B Y,
7 called as a witness, having been previously duly
8 sworn, was examined and testified as follows:
9 THE COURT: You are still under oath, sir.
10 THE WITNESS: Yes.
11 DIRECT EXAMINATION
12 (Cont'd) BY MR. BLEAKLEY:
13 Q. Good morning, Dr. Whidby.
14 A. Good morning, sir.
15 Q. Dr. Whidby, when we broke yesterday afternoon we were
16 talking about a joint conference or symposium sponsored by
17 CORESTA and TIRC that you attended in October 1972 shortly
18 after you joined Phillip Morris?
19 A. That's right.
20 Q. And I believe you said that the conferences, symposia
21 like that were attended by scientists from both inside and
22 outside the tobacco industry?
23 A. Yes, sir, that is true.
24 Q. Was this October 1972 such a conference?
25 A. Yes, it was.

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Whidby - Direct - Bleakley

1 Q. Was it public?
2 A. Yes, it was.
3 Q. How do you know it was public?
4 A. There was people from the press there.
5 Q. And just to refresh the jury what you said yesterday,
6 CORESTA was an organization that was international in scope,
7 is that correct?
8 A. That is true, yes.
9 Q. Scientists interested in tobacco issues?
10 A. Correct.
11 Q. And that TCRC was Canada and the U.S.?
12 A. Principally Canada and the U.S.
13 Q. Principally a similar kind of organization?
14 A. That's right.
15 Q. Now, let's go back to this particular conference in
16 October of '72, I believe in Virginia. Did Dr. William Dunn
17 of Phillip Morris make a presentation?
18 A. Yes, he did.
19 Q. How do you know?
20 A. I was there.
21 Q. Was there an abstract or a copy of the report that Dr.
22 Dunn gave that was presented at that meeting?
23 A. Yes, sir.
24 Q. Can you tell us just before we look at that document,
25 what is an abstract?

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Whidby - Direct - Bleakley

1 A. An abstract in general terms is a synopsis, if you will,
2 a small portion of a talk or paper that tells you what's going
3 to be in the paper or the talk.

4 Q. Can we put 4.1 up on the screen?

5 MR. BLEAKLEY: This is BCD 998. I believe that it
6 was introduced by plaintiffs in evidence with another exhibit
7 number.

8 THE COURT: We'll put it in under that number.
9 Admitted.

10 (So marked Defendants' Exhibit BCD 998 in evidence.)
11 Q. Is this a copy of the abstracts of Dr. Dunn's
12 presentation?

13 A. Yes, sir, it is.

14 Q. And the title is Motives and Incentives in Cigarette
15 Smoking, as a matter of fact?

16 A. Yes, sir.

17 Q. Could you put up 4.1.2.

18 The summary of the abstract of Dr. Dunn's
19 presentation says:

20 "The question is put as to why people smoke. The
21 answer is proposed that one smokes to obtain nicotine. It is
22 contended in this paper that nicotine, specially packaged, is
23 the cigarette industry's product. Human engineering features
24 of the cigarette are discussed to explain why it has become
25 the favored smoking form to support the argument that it

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Whidby - Direct - Bleakley

1 cannot readily be replaced as the nicotine package of choice."

2 Do you see that?

3 A. Yes.

4 Q. Do you remember that being the general subject matter of
5 Dr. Dunn's presentation?

6 A. Yes, I do.

7 Q. Turn over to page 3, I think it's 4.3 of this abstract,
8 and highlight that portion. Do you see there that Dr. Dunn
9 refers to a conference that happened in St. Martin? Do you
10 see that?

11 A. I see that, yes.

12 Q. And he says that the first proposition reflects the view
13 of the majority of the conferees. He is referring to the
14 St. Martin conference?

15 A. Yes, so it appears.

16 Q. "The smoker primarily seeks the subtle transient
17 physiological response to inhale smoke. There are many other
18 reasons why a person smokes but the primary reason is to
19 obtain the physiological response."

20 Do you see that?

21 A. Yes, sir, I do.

22 Q. All other reasons for smoking are secondary?

23 A. Yes, sir.

24 Q. Let me stop you here for a second. Dr. Dunn was a
25 scientist in the research and development?

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Whidby - Direct - Bleakley

1 A. Yes, sir, he was.

2 Q. Did he work in the same area that you did?

3 A. No, he did not. We were both in research but not in the
4 same areas.
5 Q. What was the subject matter of his research?
6 A. Why people smoke.
7 Q. That wasn't part of your area of expertise?
8 A. No, sir.
9 Q. You said that the conference was covered by the media.
10 How do you know that?
11 A. A newspaper article appeared shortly after the
12 conference.
13 Q. Did you actually see that article at the time?
14 A. Yes, I did.
15 Q. Could you put up 6.1. This is Defendants' Exhibit BCD
16 31344. What newspaper is that in?
17 A. It's in the Newport News Daily Press.
18 Q. And you read this article at the time?
19 A. Yes, I did.
20 Q. Was it just a few days after this conference?
21 A. I believe that's correct, yes.
22 Q. And the title of the article is, "Why Do People Smoke?
23 Authority says Full Answers Still Lie Hidden"?
24 A. Right.
25 Q. Who is the person in the picture on the right?
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Whidby - Direct - Bleakley

1 A. That is Dr. Dunn.
2 MR. BLEAKLEY: Your Honor, we move the admission of
3 Exhibit 31344.
4 THE COURT: Admitted.
5 (So marked Defendants' Exhibit 31344 in evidence.)
6 Q. Going back, have you had an opportunity to read the
7 abstract that we put up there on the screen in the last few
8 days?
9 A. Yes.
10 Q. Did you see anywhere in that abstract that Dr. Dunn said
11 that he concluded that cigarette smoking was addictive?
12 A. I didn't see that.
13 Q. Let's move on to the work, the actual work you did once
14 you got to Phillip Morris.
15 When you arrived at Phillip Morris in 1972, was the
16 company already engaged in efforts to develop potentially
17 safer cigarettes?
18 A. Yes, it was.
19 Q. I want to ask you a question. When you came to work at
20 Phillip Morris, were you a smoker?
21 A. Yes, I was.
22 Q. And at the time that you went to work for Phillip Morris,
23 did you believe that cigarette smoking caused disease?
24 A. Yes, I did.
25 Q. Did you think that cigarette smoking caused lung cancer?
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Whidby - Direct - Bleakley

1 A. Yes, I did.
2 Q. Did you think that it was addictive?
3 A. I thought it was extremely hard for some people to stop
4 smoking. Other people not so hard, but some people very
5 difficult for them to stop smoking.
6 Q. Are you a smoker today?
7 A. No, I'm not.

8 Q. When did you quit?
9 A. When my first grandson was born. I think that's about
10 seven years ago.
11 Q. Why did you quit?
12 A. I didn't want him to see me smoking nor did I want him to
13 smoke.
14 Q. Can we put up Exhibit 1.2, which is demonstrative
15 000479. Does this demonstrative exhibit describe in very
16 general terms the areas in which Phillip Morris has attempted
17 to develop potentially safer cigarettes?
18 A. Yes, it does.
19 Q. Let's look at this one. "General reduction," tell the
20 jury what you mean when you use the term "general reduction."
21 A. General reduction, what I mean is the techniques we use
22 to reduce the tar and nicotine in our cigarettes.
23 Q. Generally across the board?
24 A. Generally across the board.
25 Q. So the jury has heard a lot about low tar and nicotine
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Whidby - Direct - Bleakley

1 cigarettes in this case. Those are general reductions?
2 A. Generally reduced relative to a non-filtered cigarette,
3 that's correct.
4 Q. And the second area is selective reduction. What does
5 that mean?
6 A. Selective reduction means our attempts to remove specific
7 individuals or classes of individual harmful constituents from
8 the smokescreen.
9 Q. And the third is denicotinized tobacco. What does that
10 mean?
11 A. Denicotinized tobacco is a title for selective reduction,
12 and that was our effort to remove nicotine from tobacco so no
13 nicotine would be in the smoke -- no smoke -- no nicotine
14 would be in the smoke from the cigarette.
15 Q. And the fourth area is non-conventional cigarettes.
16 Would you tell the jury what you mean by that?
17 A. Yes. Let me compare it to conventional cigarettes. When
18 I say conventional cigarette, what I mean is that tobaccos
19 burn in the cigarette to generate the heat and the energy to
20 drive off smoke and nicotine from the tobacco. In a
21 non-conventional cigarette, we use something other than the
22 tobacco, such as a heat source, a collectively heated -- a
23 heater to drive off the smoke and nicotine and flavors from
24 the tobacco. That is a non-conventional cigarette as compared
25 to a conventional cigarette.

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Whidby - Direct - Bleakley

1 Q. Let get back to each of those in a minute. When you
2 arrived at Phillip Morris in 1972 was the company's R&D
3 already engaged in effort in each of these four areas?
4 A. Yes, we were.
5 Q. Let's talk a little bit about general reduction. What
6 are -- can you put up 1.23 for a moment? This is another
7 demonstrative exhibit, 000447.
8 First I want to ask you, before I ask you to explain
9 how specifically Phillip Morris has attempted generally to
10 reduce tar and nicotine, has in fact Phillip Morris succeeded
11 in reducing the tar and nicotine content of its cigarettes
12 over time and does this demonstrative show how?

13 A. It doesn't show how, it shows how much.
14 Q. Would you explain to the jury what this Exhibit 000447
15 shows?
16 A. What this shows, the chart on the left-hand side is the
17 tar yield and the chart on the right-hand side is the nicotine
18 yields. The first bar that goes up 1954 associated with it
19 for the tar yield says that 36 milligrams, and that is the
20 amount of tar that came from the sales weighted average
21 cigarette that was on the market.
22 The bar on the right, 1994 says 12 milligrams and
23 1994 the average cigarette, if you will, on the market was 12
24 milligrams of tar.
25 In a similar fashion, the nicotine yield in 1954 from
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1 these cigarettes that had 36 milligrams of tar was 3.3
2 milligrams. And in 1994 that value of nicotine had been
3 reduced to 0.9 milligrams of nicotine.
4 Q. Let's look at 1.3.
5 Now I'd like to you explain briefly to the jury the
6 methodologies that you used to try to reduce generally the tar
7 and nicotine content of cigarettes. But first, on this
8 demonstrative let me ask you what the graph is that showed tar
9 yield and nicotine yields.
10 A. Right. Along the left-hand vertical axis there is
11 numbers that go from 38 down to 10, and those numbers
12 represent the tar levels or the tar concentration, and the
13 green line, the line that is 38 in 1955 is the tar curve as it
14 changes over time.
15 So, for example, if you can follow that down, all the
16 way down to 1990, and if you look on the left-hand axis, you
17 see a value of 12. That green line is slightly below 12 at
18 that point and that is the tar decrease over time. And again,
19 in a similar fashion, the right-hand portion of that chart
20 going from 3.1 down to 0.3 is the reduction in nicotine that
21 has occurred over those years, going from a value of about 2.6
22 down to a value of about .4.
23 Q. These data are for the industry as a whole as opposed to
24 the prior --
25 A. Yes, these are industry as a whole.
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1 Q. And the bar graph that you showed, that was for Phillip
2 Morris alone?
3 A. Phillip Morris alone, correct.
4 Q. You also have on this demonstrative, which is demo 1852,
5 it shows four different subject matters. One is called
6 filtration, the second is porous paper, ventilation, then
7 expanded tobacco. Are these the methods by which Phillip
8 Morris engaged in general reduction efforts?
9 A. That's correct, yes.
10 MR. BLEAKLEY: Your Honor, although this is a
11 demonstrative, we'd like to move the admission of this one.
12 MR. HEFTER: I would just say that the practice in
13 the case has not been to move demonstratives.
14 THE COURT: Based on statistics in a published
15 journal and the witness testifies that they are accurate, I
16 suppose it can come in. Your demo 1852 is being offered in
17 evidence. Admitted.

18 (So marked Defendants' Exhibit 1852 in evidence.)
19 Q. Let's talk about the first, filtration. Can you describe
20 it briefly? I think we have a general sense what it means.
21 Very briefly, what are we talking about when we say
22 filtration?
23 A. Briefly, filtration is the use of cellulose acetate
24 filters to trap tar and nicotine, to keep that tar and
25 nicotine from going into the smoker's mouth in the most
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Whidby - Direct - Bleakley

1 general and broad terms.
2 Q. Are there kinds of filters other than cellulose acetate
3 filters?
4 A. Yes, there are.
5 Q. What are they?
6 A. There are other filters on the market, charcoal-based
7 filters and paper-based filters.
8 Q. And has Phillip Morris made cigarettes with charcoal
9 filters --
10 A. Yes.
11 Q. -- during the entire time that you were there?
12 A. Yes.
13 Q. Have there been any particulars problems that Phillip
14 Morris has encountered in attempting to develop new kinds of
15 effective filters?
16 A. The problems that we have is in the taste of the
17 cigarette in general and getting filters that are more
18 efficient, that will filter out more of the tar and nicotine
19 without causing them to be so hard to puff on that the
20 consumer will reject them or to change the taste so much that
21 the consumer will reject them.
22 Q. Can you give the jury an idea of the kind of resources
23 that Phillip Morris has devoted to improving filters in
24 cigarettes?
25 A. We have had numbers of people in the order of 10, 15,
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1 maybe more on occasion, working in the area of filtration in
2 the research center in Richmond. In addition to that, we
3 worked with universities, we worked with our suppliers of
4 filters, such as Eastman Chemical and Celanese, who are the
5 manufacturers of the filters that go with that. There are
6 large research groups at both of those companies. They have
7 joint projects with them to improve the filtering materials
8 and the filter itself.
9 Q. The second area is porous paper. What does porous paper
10 have to do with reduction of tar and nicotine?
11 A. The porous paper that we have been talking about here is
12 the paper that surrounds the tobacco core. It's the paper
13 that surrounds that, and the paper that burns. The purpose of
14 the porous paper is to allow air to get into the cigarette and
15 noxious compounds in the smoke to go out, to feed out of the
16 paper compounds such as carbon monoxide and oxides of
17 nitrogen, and the air is coming in that tends to dilute the
18 smoke stream so you are not getting just the tar and nicotine
19 from the burning tobacco, you are getting some air too. So
20 that's one of the effective ways of reducing the tar and
21 nicotine in the cigarette.
22 Q. Has Phillip Morris been working on improvement in porous

23 paper techniques during the entire time that you were there?
24 A. Yes, we have.
25 Q. Is Phillip Morris still working on improvements in porous
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1 papered to?
2 A. Yes, we are, I consult in that area, we are working on
3 it.
4 Q. Is Phillip Morris still working today since you have
5 retired to improve methods of filter technology?
6 A. Yes, we are. I say "we" because I'm consulting.
7 Q. The third is ventilation. What is ventilation?
8 A. Ventilation in its simplest form is putting holes in the
9 filter so when you puff on the cigarette, you draw in more air
10 than you would by using porous paper. So the air dilutes the
11 smoke and that's it in its simplest form.
12 Q. How does it cause reduction of tar and nicotine?
13 A. If you puff in air rather than smoke, it reduces tar and
14 nicotine.
15 Q. How does Phillip Morris make these ventilation holes in
16 the cigarettes?
17 A. We currently use laser technology, lasers to drill the
18 holes in the paper that goes around the filter.
19 Q. Has Phillip Morris also used laser technology?
20 A. No, we haven't. We didn't use laser technology until we
21 developed that. Originally we used mechanical means to put
22 holes in the filter and that mechanical means was basically
23 needles that punched holes in the filter after the filter was
24 made.
25 And the next technique we used was something called
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1 electrostatic perforation, which is electric sparks that were
2 used to burn small holes in the tipping paper of the
3 cigarette. That worked okay with brown tip cigarettes but it
4 didn't work with white tip because the little burn holes were
5 so visible and the consumer did complain about that.
6 Q. When did laser technology become available?
7 A. We didn't have laser technologies available until the
8 late '70s.
9 Q. Is laser technology the best way to make these
10 ventilation holes?
11 A. Yes, it is.
12 Q. Where are the ventilation holes in Phillip Morris
13 cigarettes?
14 A. 12 millimeters from the mouth end of the cigarette.
15 Q. Can you see them with a naked eye?
16 A. In most products you cannot see them. In some you can.
17 Q. Was the decision about where to place these ventilation
18 holes something that you were personally involved with?
19 A. Yes, I was.
20 Q. How did you decide where to put the ventilation holes?
21 How and why?
22 A. There is two considerations when you are putting the vent
23 holes or the ventilation holes in a cigarette. One is based
24 upon the physics of the filtration. I'll explain that. It's
25 not real complex. If it was, I couldn't explain it.
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1 The vent holes need to be as close to the mouth as
2 possible. The reason they needed to be as close to the mouth
3 end as possible is because you want to have them so that the
4 air is going into the filter and leaving as much of the filter
5 to take up the smoke as possible, because the filter is more
6 efficient when the smoke is moving slow. The smoke particles
7 are moving slow. So it can take up more of the particles. If
8 it's moving faster to the filter, it's less efficient.

9 There is a reason why the holes are placed where they
10 are. You don't want to put the holes too close to the mouth
11 end. Otherwise, the smoker will put the holes in his mouth
12 and defeat the purpose of the holes. So we place the holes
13 two millimeters away from the mouth end of the filter so they
14 are not likely to be covered with the lips or the fingers.
15 However, it's still possible for some of them to be closed and
16 if only a few of them are closed, it doesn't totally defeat
17 the purpose of the holes.

18 Q. Let's go to the fourth of the areas involved in general
19 reduction, expanded tobacco. Can you tell us very briefly
20 what expanded tobacco is. Can you put up 1.3.

21 Forget it, just tell us what expanded tobacco is?

22 A. Think of popcorn.

23 Q. A little bit more --

24 A. A little more detailed. Puffed wheat, rice, corn is all
25 sort of expanded, if you will. We have a process that we used

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1 to expand our tobacco and really what it does is bring the
2 tobacco back to the size it was when it was a green leaf.
3 What happens when the leaf dries, it shrinks down and we have
4 a process which we treat that tobacco with carbon dioxide,
5 then heat it. Then carbon dioxide expands really quickly and
6 brings the tobacco back to its green leaf state.

7 Q. How does the use of expanded tobacco help in the effort
8 generally to reduce tar and nicotine?

9 A. Like popcorn, the expanded tobacco will take less of it
10 to fill a cigarette. So if there is less tobacco there when
11 you burn it, you generate less tar and nicotine.

12 Q. Let me ask you a couple of questions about specific
13 general reduction effort for a couple of specific brands of
14 Phillip Morris cigarettes. The first one I want to ask you
15 about is Merit, because you are familiar with Merit.

16 A. Yes, I am.

17 Q. Were you involved in development of the Merit products?

18 A. Yes.

19 Q. Tell us briefly what Merit is.

20 A. Merit cigarettes, the Merit brand family of cigarettes is
21 a low tar family of cigarettes. The Merit cigarette was
22 developed at R&D by one of our scientists who had the idea
23 that if he could -- the concept was if you take smoke and
24 separate out of smoke the flavorful compounds, then once
25 knowing what those are, put those back in tobacco and then

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1 smoke that, you have something that you have a low tar
2 cigarette, which that would have good taste.

3 And the reason that the low tar cigarette is to have

4 people, actually have people buy low tar cigarettes. And
5 before Merit they were not very popular.

6 So what he did was to use a technique gas
7 chromatography, that allowed him to separate the smoke into
8 individual components. He built a sniffing port on the gas
9 chromatograph so that you could smell that. When he got one
10 that had intense flavor, intense good flavor, he would
11 identify what that was, and once he had gone through a number
12 of compounds, he would put those back together and put those
13 on tobacco, and that really was the genesis of the Merit
14 product.

15 Q. Was this gas chromatography that you talked about a new
16 technology?

17 A. The technology was there but the idea of using it along
18 with his nose and separating out the compounds and identifying
19 those, that was new.

20 Q. When was this?

21 A. This occurred in the mid-seventies.

22 Q. Let me ask you about one other brand in connection with
23 general reduction, and that is Cambridge. You are familiar
24 with Cambridge?

25 A. Yes.

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1 Q. What is the Cambridge cigarette? What was it and when
2 was it introduced?

3 A. The Cambridge cigarette was introduced, as I recall, in
4 1980, and we had just developed the laser technology to be
5 able to use lasers to create the vent holes in the filter. So
6 in combination with that and in combination with our knowledge
7 of how to make the Merit cigarette, we set out to design the
8 very, very low tar cigarette, and the Cambridge brand family
9 was to be even lower than Merit.

10 Q. What were the tar and nicotine contents of the various
11 Merit brands?

12 A. The Merit brands at that time I think in general were in
13 the eight- to ten-milligram category.

14 Q. When Cambridge was introduced, I think you said was
15 1980 --

16 A. Yes.

17 Q. -- how many brands were in the Cambridge family at that
18 time in 1980?

19 A. There were three.

20 Q. What were the tar content of each of the three of them?

21 A. There was one at four or five milligrams.

22 Q. Four or five milligrams?

23 A. Four or five milligrams, I recall. One at one milligram
24 and one at less than .1 milligram.

25 Q. So there were three different cigarettes?

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1 A. Yes.

2 Q. Did they have different packaging or did they look
3 different?

4 A. They were identified, yes, as tar level.

5 Q. Each one separately?

6 A. Each one separately, yes.

7 Q. And the lowest of those I think you said was less than
8 .5?

9 A. Less than .1.
10 Q. You recall the reason why Phillip Morris was attempting
11 to develop and offer on the market a less than .1 milligram
12 cigarette?
13 A. We wanted to compete in that market area. The best I
14 remember.
15 Q. You were a smoker at the time?
16 A. Yes.
17 Q. Did you ever smoke this less than .1 milligram Cambridge?
18 A. Yes, I did.
19 Q. What was it like to light it?
20 A. Very difficult to light.
21 Q. Did you have to provide instructions about how to light
22 it to your customer?
23 A. Yes, we did.
24 Q. What was it like to smoke?
25 A. Very difficult to draw. To draw for people who don't
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1 smoke -- easy to draw situation would be something like
2 getting coke through a soda straw, and something very
3 difficult to draw would be like, I don't know, like sucking on
4 a brick. It's very difficult to draw out of a cigarette.
5 Q. What did it taste like?
6 A. It didn't have much taste at all.
7 Q. Did Phillip Morris introduce this .1 milligram Cambridge
8 cigarette across the country?
9 A. Yes, we did.
10 Q. It sold throughout the U.S.?
11 A. Yes.
12 Q. Was it a successful brand?
13 A. No, it was not.
14 Q. Did customers buy it?
15 A. Bought a few, but not many.
16 Q. Is the .1 milligram Cambridge still on the market today?
17 A. No, it's not.
18 Q. Is the original one milligram -- I think you said the
19 second one was one milligram?
20 A. Yes, I did.
21 Q. Is the original one-milligram Cambridge still on the
22 market?
23 A. No.
24 Q. Is the original four to five milligrams Cambridge still
25 on the market?
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1 A. No, it's not.
2 Q. When were these taken off the market, if they were at
3 different times?
4 A. They were all taken off in 1986.
5 Q. 1986?
6 A. Yes.
7 Q. And did the Cambridge brand name go out of existence at
8 that time in 1986?
9 A. No, it did not.
10 Q. Does that mean that Phillip Morris introduced a new
11 Cambridge at some point in time?
12 A. Yes.
13 Q. When was that, 1986?

14 A. 1986, 86, '87.
15 Q. Tell us about the new Cambridge brand or family of
16 brands. What were they and how much tar did they contain?
17 A. The new cigarettes that were put on the market, the new
18 packages completely redesigned were put on the market at five
19 milligrams and ten or eleven milligrams.
20 Q. And were they in the same packages as the old Cambridge
21 cigarettes?
22 A. No, they were.
23 Q. Were they advertised as the lowest tar ever?
24 A. No.
25 Q. Did they have different color packages?
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1 A. Yes, they did.
2 Q. Were they directed at any particular segment of the
3 market?
4 A. Yes, they were.
5 Q. What was that?
6 A. In that time, at that time frame the generic cigarettes,
7 the low process cigarettes were beginning to take over a
8 significant portion of the market. And as I understand it,
9 Phillip Morris wanted to be able to compete in that market.
10 So we designed a cigarette that would be a branded generic
11 cigarette against some of the other cigarettes on the market,
12 and that's the reason that letter was repositioned.
13 Q. Cambridge, you mean?
14 A. Cambridge was repositioned. I apologize.
15 Q. When the Cambridge, the newly packaged, redesigned and
16 repositioned Cambridge came on the market in 1986, did it have
17 different graphics from the original?
18 A. Yes, it did.
19 Q. Different prices from the original?
20 A. Yes, it did.
21 Q. Did the advertising slogan change?
22 A. Yes.
23 Q. What was the slogan in the new Cambridge cigarette?
24 A. I don't recall exactly. It had something to do with
25 price, value.

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1 Q. Did you ever hear, when you were at Phillip Morris and
2 the Cambridge product was being developed, anyone suggest when
3 Cambridge was first being brought on the market as a
4 one-milligram product, that the plan was to advertise it as
5 the lowest tar content ever and have it drift up in tar
6 content?
7 A. No.
8 MR. HEFTER: Objection, your Honor.
9 THE COURT: I'll allow it.
10 A. No, I did not.
11 Q. Did you ever hear anyone suggest that it was Phillip
12 Morris's intent to fool consumers with this Cambridge brand?
13 A. No, I did not.
14 Q. Let's get back to 1.2. Let's talk about the second
15 method by which Phillip Morris attempted to develop
16 potentially safer cigarettes, selective reduction, and I think
17 you said that was an effort to get particular things out of
18 cigarettes?

19 A. Right.
20 Q. When you were at Phillip Morris did you personally work
21 on the effort at selective reduction?
22 A. Yes, I did.
23 MR. BLEAKLEY: Can you put up 1.1 9, Dave.
24 This is demo 760, your Honor.
25 Q. We have put 6 different chemicals or compounds on this
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1 list and I want to ask you about each of them.
2 In its effort at selective reduction has Phillip
3 Morris tried to selectively reduce phenols in tobacco smoke?
4 A. Yes, we have.
5 Q. Has Phillip Morris tried to remove aldehydes?
6 A. Yes, we have.
7 Q. What are PAHs?
8 A. Polyaromatic hydrocarbons.
9 Q. Some times called polynuclear? They are all the same?
10 A. Right.
11 Q. Has Phillip Morris tried to reduce by selective reduction
12 PAHs in tobacco smoke?
13 A. Yes, we have.
14 Q. Is the same true with carbon monoxide?
15 A. Yes.
16 Q. Is the same true with heavy metals?
17 A. Yes.
18 Q. Finally, with nitrosamines?
19 A. That's correct.
20 Q. During the period that you were at Phillip Morris, let's
21 start with the beginning in the 1970s, 1972, when you got
22 there, was it public knowledge that each of these six
23 compounds were in tobacco smoke?
24 A. Yes.
25 Q. Why were these particular compounds chosen by Phillip
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1 Morris as ones that you would try to reduce selectively from
2 tobacco smoke?
3 A. Both the toxicologists at Phillip Morris and the
4 toxicologists and people in the public health community were
5 concerned with cigarette smoking, saying that these things
6 should be removed from the cigarette smoke.
7 Q. From the product development point of view, from the
8 point of view of your work at Phillip Morris, has selective
9 reduction been an easy thing to accomplish?
10 A. No, it is not.
11 Q. Why is that?
12 A. Well, the smoke itself is a very complex mixture of over
13 4,000 different chemical compounds, and most of these things
14 that are on the list here, with a few exceptions, are in the
15 particulate or the particles of smoke, and trying to get one
16 of these compounds out of the -- out of a particle of smoke is
17 extremely difficult.
18 The compounds that are in the gas phase or vapor
19 phase are to some extent easier, although those are very
20 difficult, also. We have had very little success in removing
21 any of the constituents out of the particulate phase, some
22 success in removing some constituents out of the vapor phase.
23 Q. When you attempt to remove one compound from tobacco

24 smoke, does it sometimes have an effect on what else is
25 developed in the smoke?
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1 A. That is unfortunately true also.
2 Q. Can you explain to us what you mean?
3 A. If you attempt to remove, say, one compound out of
4 tobacco or out of smoke, sometimes that compound is preventing
5 another set of compounds from forming, so it may be producing
6 some noxious material, but also may be preventing the
7 formation of some other noxious materials. If you take it
8 out, it has a two-edged effect.
9 Q. Can you give us one example?
10 A. One example might be nitrates. Nitrates are thought to
11 lead or do lead to nitrosamines and oxides or nicotine again.
12 Nitrates also to some extent prevent the formation of PAHs,
13 polycyclic hydrocarbons.
14 Q. Let's talk about your effort with each of these six
15 general categories here.
16 Has Phillip Morris had any success in the general
17 reduction of phenols?
18 A. Yes, we have.
19 Q. How have you done that?
20 A. Through the general reduction techniques, phenols also
21 are reduced along with the tar. Specifically, however,
22 phenols are reduced by use of a cellulose acetate filter with
23 a plasticizer that we use, that is, something that holds the
24 small fibers in the cellulose acetate filter together, so it
25 makes it into a unit that you can make a filter out of it. It
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1 turns out that the phenols, most of the phenols are in the
2 vapor phase, so the filter is effective in absorbing the
3 phenols from the smokescreen.
4 Q. So is it fair to say that you have been able to reduce
5 the amount of phenols in tobacco smoke by both general and
6 selective reduction?
7 A. Yes, that's correct.
8 Q. Do you know what percentage of the phenols in tobacco
9 smoke have been eliminated as a result of the effort?
10 A. I believe it's 90 percent.
11 Q. The aldehydes, have you had success in the selective
12 reduction of aldehydes in tobacco?
13 A. No, not to any great extent.
14 Q. What about charcoal filters?
15 A. Charcoal filters do reduce the aldehydes.
16 Q. When you were in Phillip Morris in 1972 did Phillip
17 Morris have charcoal filters on the market?
18 A. Yes, we did.
19 Q. Has there been any point in time that you've been with
20 Phillip Morris when it has not had one or more cigarettes made
21 out of charcoal filters?
22 A. No.
23 Q. Can you tell the jury what some of the brands are that
24 Phillip Morris has with these charcoal filters?
25 A. We have a Parliament on the market, a Lark and a
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- 1 multi-filter on the market.
2 Q. Let's talk let's talk about the third. Polycyclic
3 aeromatic hydrocarbons, does that include things like
4 benzo[alpyrene?
5 A. Yes. That is one of the class of these compounds, yes.
6 Q. Has Phillip Morris tried to remove PAHs from tobacco
7 smoke?
8 A. Yes, they have.
9 Q. Has Phillip Morris ever stopped trying to remove
10 selectively PAHs from tobacco smoke?
11 A. No, we are working on it today, right now.
12 Q. Has Phillip Morris had any success removing PAHs from
13 tobacco smoke?
14 A. Not any substantial success, other than through general
15 reduction.
16 Q. I was just going to ask that. Does that mean the fact
17 that you've been unable to reduce selectively PAHs from
18 tobacco smoke does that mean PAHs have not been reduced in
19 smoke?
20 A. They have been greatly reduced.
21 Q. That has been by general reduction, but you haven't had
22 luck in selective reduction of PAHs?
23 A. Yes.
24 Q. Is that so for phenols as well?
25 A. Yes.

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- 1 Q. Let's go on to carbon dioxide.
2 Has Phillip Morris had any luck in trying the reduce
3 selectively the carbon monoxide from cigarettes?
4 A. No.
5 Q. Has Phillip Morris tried to reduce carbon monoxide in
6 tobacco smoke during the entire time that you've been
7 associated with the company?
8 A. Yes, we have.
9 Q. Still trying today?
10 A. Yes, we are.
11 Q. I'll ask you a little later about a project that you
12 worked on involving use of cobalt filters. That was a project
13 that was designed to reduce selectively carbon monoxide from
14 cigarette smoke?
15 A. Yes, it was.
16 Q. We'll come back to that.
17 Does the fact that you've been able to reduce
18 selectively the amount of carbon monoxide in smoke mean that
19 the total amount of carbon monoxide has not been reduced?
20 A. No.
21 Q. Because of general reduction?
22 A. Because of general deduction.
23 Q. Let's talk about heavy metal, polonium 210.
24 A. That's correct.
25 Q. Can you explain briefly what polonium 210 is?

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- 1 A. Polonium 210 is heavy metal, it's also radioactive, that
2 is present in the soil and it's deposited on the tobacco.
3 Q. Has Phillip Morris tried to remove polonium 210 from
4 tobacco smoke?

5 A. Yes.
6 Q. What have they done to try to reduce it?
7 A. We set up methods to measure polonium 210. It's
8 important to measure to find out if you are successful in
9 removing it. We also use washing techniques of tobacco to
10 remove polonium.
11 Q. Does Phillip Morris today wash its smoke to remove
12 polonium?
13 A. No, we do not.
14 Q. Or measure polonium?
15 A. No.
16 Q. Why did Phillip Morris stop doing that?
17 A. It turned out that polonium was not a significant issue.
18 Q. Let me ask you this: In the course of your working at
19 Phillip Morris and attending scientific conferences, did you
20 ever have occasion to attend one at which polonium was being
21 discussed?
22 A. Yes.
23 Q. What, if anything, did you learn about polonium at these
24 conferences?
25 A. What I learned was that it was not one of the things that

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1 a significant amount of time needed to be put on since it was
2 such a low level.
3 Q. Is this something that you discussed with other
4 scientists at Phillip Morris?
5 A. Yes.
6 Q. That is what the other scientists were saying about
7 polonium and therefore the significant risk?
8 A. Right.
9 Q. Let's go on to the last of these items, nitrosamines.
10 Are there different kinds of nitrosamines in tobacco smoke?
11 A. Yes.
12 Q. Can you tell us what the different kinds are?
13 A. They are two kinds of nitrosamines. One is volatile
14 nitrosamines and the other is tobacco specific nitrosamines.
15 The bulk of nitrosamines are the ones that tend to be found in
16 a lot of other things. Tobacco specific nitrosamines are
17 found only associated with tobacco.
18 Q. Has Phillip Morris had any success with the selective
19 reduction of volatile nitrosamines?
20 A. Yes, we have.
21 Q. How is that?
22 A. It turns out that the cellulose acetate filter with
23 triacynolu is a very effective filter for the removal of the
24 volatile nitrosamines.
25 Q. Has Phillip Morris had any success with the selective

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1 reduction of non-volatile nitrosamines like the tobacco
2 specific nitrosamines?
3 A. We haven't had any great success.
4 Q. Sometimes called TSTSAs? Have you had any success?
5 A. Through the removal of nitrate through some of our
6 processes, we have had some success.
7 Q. Other than the methods that you have described here in
8 the last few minutes, is Phillip Morris, to your knowledge,
9 working today on any particular selective reduction efforts?

10 A. Yes, we are.
11 Q. Can you describe a couple of them for the jury?
12 A. Nitrosamines, as an example, we are working with the
13 tobacco farmers to assist them in changing the curing barns
14 that they use to cure the tobacco. It turns out that the
15 gases from the propane that is burned produces oxides of
16 nitrogen. Those oxides of nitrogen react with the tobacco to
17 form nitrosamines, and Phillip Morris and other manufacturers
18 are working with the farmers to modify their barns. We are
19 continuing to work with university and other people to seek
20 out ways to reduce the heavy metals that enter the tobacco,
21 and all these are really efforts undergoing. We are working
22 on within Phillip Morris right now in all these areas.
23 Q. Do you have a program at Phillip Morris, selective
24 reduction type program at Phillip Morris called Score?
25 A. Yes, sir.

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1 Q. Recognizing that this is somewhat of a trade secret, can
2 you describe it generally for the jury, what the SCORE program
3 is?
4 A. The SCORE program at Phillip Morris, and that is another
5 area that I'm consulting in, hopes to have on the market
6 sometime next year a cigarette that will be greatly reduced, a
7 conventional cigarette that will be greatly reduced in a
8 number of the harmful constituents in tobacco.
9 Q. Can you put 1.2 back up. We have talked about the first
10 three of these areas which Phillip Morris has tried to make a
11 potentially safer cigarette. Let's talk about the fourth.
12 Can you very briefly refresh the jury on what you mean when
13 you say non-conventional cigarettes?
14 I'm sorry, I made a mistake we haven't done number
15 three yet, denicotinized cigarettes.
16 A. I thought maybe you did it real quick and I forgot.
17 Q. Let's talk a minute about denicotinized cigarettes. Can
18 you tell us a little bit about what effort Phillip Morris has
19 made to develop denicotinized cigarettes.
20 A. Over the years, and this occurred before I went to
21 Phillip Morris, there have been efforts to remove nicotine
22 from tobacco and produce a cigarette that had no nicotine in
23 it. We worked on various techniques, solvent extraction
24 techniques to remove nicotine from tobacco.
25 The problem is some of the solvents were left. Later

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1 on we worked with the use of ammonia in steam to strip the
2 nicotine off the tobacco. That ended up with a tobacco that
3 would be not very usable and didn't taste good.
4 Finally, the last project that we worked on was the
5 use of something called supercritical fluid carbon dioxide.
6 That acts like an organic solvent. But when you get through
7 the process, the carbon dioxide, so you would have that
8 nicotine without leaving any solvent there. That is the same
9 process used to take caffeine out of coffee. So we tried
10 to --
11 Q. Let me interrupt you.
12 How did you learn about this?
13 A. We brought General Foods. Phillip Morris brought General
14 Foods and General Foods was using that process to remove

15 caffeine from the coffee.
16 Q. So you decided to try that with tobacco?
17 A. That's correct.
18 Q. And were you involved personally in this effort?
19 A. Yes, I was.
20 Q. Were you involved personally in the development of that
21 cigarette?
22 A. Yes, I was.
23 Q. Did there come a time when Phillip Morris offered on the
24 marketplace a denicotinized product that was made using
25 this -- pardon me, using this method that is like
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1 decaffeinating coffee?
2 A. Yes.
3 Q. When was that?
4 A. We put it on the market in mid to late '80s. Excuse me,
5 the late '80s to early '90s.
6 Q. A test market?
7 A. Yes.
8 Q. Was the test market successful?
9 A. No, it was not.
10 Q. Why not?
11 A. Although people bought cigarettes, they didn't come back
12 and repurchase more cigarettes, so they didn't like them.
13 Q. Would you put up 1.9, Dave.
14 Can you tell us what the entire 1228, what the entire
15 picture shows, but then in particular the highlighted
16 facilities in that picture?
17 A. The entire picture is our manufacturing facilities close
18 to Petersburg, Virginia, where we manufacture reconstituted
19 tobacco as well as the highlighted area is the plant we built
20 to extract nicotine from tobacco.
21 Q. All of the facilities in that highlighted area were
22 devoted to this denicotinized cigarette project?
23 A. Yes. Just to put it in perspective, the highlighted area
24 over on the left-hand side there, that one building is -- that
25 is it -- is about the length of three football fields.
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Whidby - Direct - Bleakley

1 Q. After the -- let me ask you this: Were you involved in
2 the effort to get financing, capitalization for this project?
3 A. At the end of the project, yes.
4 Q. Do you know about how much money Phillip Morris spent on
5 its effort to develop the denicotinized cigarette?
6 A. Something over \$300 million.
7 Q. How much of the nicotine was removed from the cigarette?
8 A. 97 percent.
9 Q. Was there a brand name under which it was test marketed?
10 A. Yes, there were several.
11 Q. What were they?
12 A. Merit, Next and Benson & Hedges.
13 Q. Did you ever try to smoke one of these denicotinized
14 cigarettes yourself?
15 A. Yes.
16 Q. How did they taste?
17 A. I can tell they were -- after a while I could tell that
18 -- this didn't taste good. First couple of tastes tasted
19 okay.

20 Q. When the product failed on the test market did Phillip
21 Morris go back to the drawing board and do anything to try to
22 improve the product?
23 A. Yes.
24 Q. Were you involved in those efforts?
25 A. Yes, I was.

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Whidby - Direct - Bleakley

1 Q. What did you do?
2 A. We tried to add flavors to the product and to correct the
3 taste problems. We also added nicotine back to see if that
4 was the problem. That wasn't the problem. It still didn't
5 taste good even when we added nicotine back.
6 Q. So were any of these efforts to improve the denicotinized
7 cigarettes successful?
8 A. No.
9 Q. What eventually happened?
10 A. It was taken off the market.
11 Q. Did you personally put a lot of time and effort into this
12 denicotinizing project?
13 A. Yes.
14 Q. Were you committed to it?
15 A. Yes, I was.
16 Q. What happened to that manufacturing facility that we just
17 saw?
18 A. It's still sitting there.
19 Q. Being used for anything?
20 A. No, it's not.
21 Q. Now we'll get 1.22 -- now we'll get to number four,
22 non-conventional cigarettes. Very briefly tell the jury what
23 you mean when you talk about non-conventional cigarettes.
24 A. Non-conventional has been contrasted to a conventional
25 cigarette. It does not burn tobacco as a heat source to

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Whidby - Direct - Bleakley

1 generate the smoke in nicotine from tobacco.
2 Q. Why from the standpoint of attempting to develop a safer
3 cigarette was Phillip Morris trying to develop a cigarette
4 that heated rather than burned tobacco?
5 A. One of the findings in the laboratory which occurred
6 before I went to Phillip Morris was that if you could generate
7 smoke from tobacco at a low temperature, that smoke coming
8 from the tobacco did not have as many of the noxious, toxic
9 compounds in them as the smoke that is generated from the
10 combustion of tobacco and the higher temperatures from the
11 combustion of tobacco.
12 So it's been a project that the researchers have been
13 interested in for a very long time, because it allows us to
14 make a product that would not have all these harmful
15 constituents in them.
16 Q. Was Phillip Morris involved in the effort to develop a
17 non-conventional cigarette of the type you just described to
18 me when you arrived there in 1972?
19 A. Yes.
20 Q. Was it involved in those efforts all through the 26 years
21 you were there?
22 A. Yes, still is.
23 Q. Still involved today?
24 A. Yes.

25 Q. What was the first effort? Describe very briefly for us
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Whidby - Direct - Bleakley

1 what the first effort that you know about of Phillip Morris
2 attempting to develop one of these non-conventional
3 cigarettes. Can you put up 1.0, please. This is just a
4 little demonstrative Exhibit 1678 that we hope to illustrate
5 it.
6 A. The first was a project called Delta.
7 Q. Tell us a little bit about it.
8 A. The concept here was to use a non-tobacco heat source and
9 the little red tip at the end, I can't point at this, you
10 can't see what I'm pointing out, the end here where the arrow
11 is is carbons, a carbon pellet very similar to a charcoal
12 pellet you put on a grill. So that was hit with a match. The
13 heat from that would go back along the tube and drive off
14 flavor, nicotine, smoke from the tobacco. That was the
15 concept.
16 Q. Did it work?
17 A. We could get some smoke off of it that had nicotine in
18 it.
19 Q. Was it ever developed into a commercial product?
20 A. No, it was not.
21 Q. Why not?
22 A. We had -- we didn't have a good means of containing the
23 heat source. Occasionally, the heat source being carbon, the
24 carbon pellet would burn through and fall out and that is
25 something that just wasn't very good.

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Whidby - Direct - Bleakley

1 Q. Looking at your time line here, the next appears to be in
2 about 1982, is that right?
3 A. Right.
4 Q. Tell us about that.
5 A. Another way which is obvious is using a battery or
6 electricity to heat the tobacco and generate smoke and
7 nicotine from the tobacco. The one that is shown in 1982 on
8 the top there, that is a flashbulb. I know it sounds silly at
9 this point but these were things that we tried.
10 A flip flash came on the market, something by Kodak,
11 and it was the first time that I knew and anybody else knew, I
12 guess, that somebody had a flashbulb that contains it's own
13 battery. And you used it in a camera. So it was a real
14 innovation from Kodak.
15 And we thought maybe we could use this to get a
16 little smoke out of the taste, but that didn't work. It
17 didn't give off enough heat to generate smoke. The one below
18 is a little bit more successful, which was basically a heating
19 wire in a cigarette to generate smoke, and we could get one
20 good puff, one reasonably good tasting puff off of that.
21 So some of this was encouraging, technology was
22 moving to the point where batteries were getting to the point
23 where they could be contained within some functional unit such
24 as the flip flash later on moving to a heating core.
25 Q. Is that 1987?

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Whidby - Direct - Bleakley

1 A. 1982, yes.
2 Q. 1982. Were you able to develop a commercial, marketable
3 cigarette?
4 A. No. These were laboratory units. We were trying ideas.
5 Q. Why couldn't they be marketed as a cigarette?
6 A. The flip flash didn't work and the heating core only gave
7 off one good puff, and that probably wasn't good enough
8 either. And there were other problems with it. But those
9 were the outstanding problems, the ones nobody knew how to get
10 around.
11 Q. Delta 2 in 1987 -- let me ask you first, did something
12 happen around this time that prompted your effort in
13 connection with Delta 2?
14 A. Yes, it did.
15 Q. What was that?
16 A. One of our competitors put a cigarette on the market
17 similar to this.
18 Q. What was it called?
19 A. I think it was called Premier.
20 Q. Tell us about the Delta 2 project?
21 A. The Delta 2 project was our attempt to use a heat source,
22 and this was carbon, to drive off flavors in nicotine from
23 tobacco. What we did was to try to better contain the heat
24 source, and represented here, you can't see it well, is a
25 little metal tin which holds the heat source as well as

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Whidby - Direct - Bleakley

1 pellets in back, in proximity to the heat source, to get
2 enough heat in the carbon to drive off the flavors and the
3 nicotine from that.
4 Q. Did it work?
5 A. It was better than the original Delta.
6 Q. Did you develop a marketable commercial cigarette from
7 it?
8 A. No, we didn't.
9 Q. Why not?
10 A. Much too complex to be developed at high speed. We did
11 try to build machinery to put it together, but we were not
12 successful in doing so.
13 Q. All right. Next, on your time line, there is something
14 called Sigma in 1988. What was that?
15 A. Sigma was an extension of Delta. And as you may recall,
16 we talked a little bit about the denicotinized tobacco. So
17 this Sigma product was to be an improved product over the
18 Delta.
19 The carbon heat source generated a lot of carbon
20 monoxide, and we thought that in a non-conventional product we
21 didn't want carbon monoxide to be a significant component of
22 that. And we decided to use the denicotinized tobacco in the
23 Sigma product so this product would have very low or no carbon
24 monoxide and no nicotine. And we developed something called
25 iron nitrite, which could be lit and would burn like charcoal,

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Whidby - Direct - Bleakley

1 would not give off any carbon monoxide.
2 Q. Did it work?
3 A. To some extent.
4 Q. Did you develop a marketable, commercial cigarette?
5 A. No, we had the same problems with Sigma that we had with

6 Delta 2. We weren't able to build machinery to put this
7 complex unit together.
8 Q. After Sigma, did you continue to try to develop a
9 non-conventional cigarette that heated instead of burned?
10 A. Concurrently with all this work was burning heat sources,
11 if you will. We were working, we continued to work on the
12 electric cigarette concept. And in 1988 we in the laboratory
13 put together a unit that looks a lot like what is seen here
14 below 1998, the beta concept, where we would heat -- and this
15 is really the breakthrough -- heat a fresh piece of tobacco
16 for every puff so you don't have to reheat old tobacco, so you
17 get fresh tobacco for every puff. That way we can get good
18 tasting smoke from a cigarette.
19 Q. That was beta?
20 A. That was the beta concept, yes.
21 Q. Did you develop a marketable commercial cigarette from
22 beta?
23 A. Yes, we did.
24 Q. Did you market a cigarette using a car battery?
25 A. No, we did not.

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Whidby - Direct - Bleakley

1 Q. You said the beta concept or project eventually resulted
2 in a commercial product?
3 A. Yes.
4 Q. And that is the Accord?
5 A. That's right, yes.
6 Q. Had you personally been involved in the development of
7 the Accord?
8 A. Yes, I have.
9 Q. Do you have one with you?
10 A. Yes.
11 Q. Can you show it to the jury?
12 THE COURT: Mark those. Mark those two items if you
13 are going to put them in.
14 MR. BLEAKLEY: I'm not.
15 THE COURT: Mark them if you are going to show
16 them.
17 MR. BLEAKLEY: We have marked these for
18 identification as BCD 31350 and 31351.
19 Q. This is an Accord. Is this a commercial product that is
20 being sold now?
21 A. Yes, it is.
22 Q. Is it being sold everywhere in the world or everywhere in
23 the United States?
24 A. No, it's not.
25 Q. How is it being sold?

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1 A. In test markets.
2 Q. Where?
3 A. It's being test marketed in Richmond, Virginia, and
4 Osaka, Japan.
5 Q. Can you tell the jury very briefly how the Accord works?
6 A. Well, the Accord has a cigarette which is a new cigarette
7 that is inserted into the carried lighter, and when you do,
8 it's ready to go. It's ready to be puffed upon. Nothing
9 happens until you puff. It has a puff sensor in it. It
10 senses when you puffing and it heats up a heater element

11 within the core. There are eight heater elements so that you
12 can get eight puffs off the cigarette, so you can take a puff
13 off of it, set it down, and then when you are ready take
14 another puff off of it.

15 So this is battery powered. It has eight puffs per
16 cigarette. So it's really a lighter that generates heat for
17 every puff to give a puff from the cigarette.

18 Q. It has tobacco in it?

19 A. Yes, it does. The cigarette has tobacco in it. It has a
20 filter.

21 Q. It has nicotine in it?

22 A. Yes, it does.

23 Q. And it has some what we call tar in it?

24 A. Yes.

25 Q. Does it have a reduced amount of tar in it?

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1 A. Yes, it does.

2 Q. And you said this was in a test market in Osaka, Japan,
3 and in Richmond, Virginia?

4 A. That's correct.

5 Q. And has the test market been successful in any way?

6 A. Yes, it has.

7 Q. How has it been successful?

8 A. It's been successful in what we wanted to have happen is
9 for the consumer to tell us what was wrong with this -- this
10 was the initial introduction -- what was wrong with it, how
11 could we improve it, and they have done that and we are about
12 to put on the market a new and improved version of this and
13 expand the test market.

14 MR. BLEAKLEY: Your Honor, counsel for plaintiff has
15 kindly agreed with us that we can just show the jury what the
16 new one looks like, but as you might imagine, it's full of
17 trade secrets, and we don't want to reveal trade secrets. Is
18 it all right if Dr. Whidby shows the jury what it looks like?

19 THE COURT: You can show it and put it in your
20 pocket. You can hold it.

21 THE WITNESS: I have it in my pocket, the new
22 Accord. I have to give it to him. Is that all right?

23 THE COURT: Give it to your counsel.

24 THE WITNESS: Yes, sir.

25 MR. BLEAKLEY: Marked it as Whidby Demo 1,

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Whidby - Direct - Bleakley

1 your Honor.

2 Q. Can you just describe very briefly for us and for the
3 jury, what are the general kinds of improvement on this
4 product?

5 A. It's somewhat smaller. It's lighter. It generates a
6 more flavorful smoke. It has a similar heater function. Much
7 less complex from what was before. The electronics have been
8 reduced in size considerably over this one, and the battery
9 pack is also improved.

10 So it has a number of improvements in it that will
11 hopefully give a better tasting smoke than the current Accord
12 and hopefully something that more consumers will find that
13 they would like to buy.

14 Q. And that's going to go out in test market?

15 A. Yes, it is.

16 Q. Let me ask you this: Is there any side stream smoke from
17 the Accord?
18 A. Since there is no lit end on the cigarette it's all
19 contained in the lighter. There is no side stream.
20 Q. No ashes?
21 A. No ashes.
22 Q. When you take a puff of that you can put it in your
23 pocket not worry about burning your clothes?
24 A. That's correct.
25 Q. Does Phillip Morris hold any patent related to the
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Whidby - Direct - Bleakley

1 Accord?
2 A. Yes.
3 Q. How many?
4 A. Seventy, eighty. I don't know what the count is now.
5 Q. Is there any way this product could have been developed
6 earlier?
7 A. No.
8 Q. Has Phillip Morris analyzed the smoke constituent in this
9 product?
10 A. Yes, we have.
11 Q. Has Phillip Morris published or otherwise disclosed the
12 results of those tests to the scientific community?
13 A. Yes, we have.
14 Q. Could you put up 1.17. Does this demonstrative exhibit
15 which is '87 summarize some of the reductions in the
16 constituents that are in the Accord?
17 A. Yes, it does.
18 Q. Can you describe this for us. Give the jury a brief
19 summary what this exhibit shows.
20 A. What this chart shows is the reduction of smoke
21 constituent in the Accord and on the left-hand side it goes
22 from 100 percent down to zero percent, and along the bottom,
23 it talks about some of the toxic constituents that are in
24 smoke such as benzo[a]pyrene, benzo[a]anthracene and others,
25 and the reduction there goes from 78 percent of aldehyde to
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1 around 99 percent for benzo[a]anthracene.
2 Q. What are these percentages reduced from, what?
3 A. Reduced from 1R4F cigarettes.
4 Q. Dr. Whidby, are you able to tell this jury that the
5 Accord cigarette is safer than any product on the market?
6 A. No, I'm not.
7 Q. Why not?
8 A. I don't believe there is any product on the market that
9 is safe. I'm sorry, safer.
10 Q. Safer?
11 A. I can't say it's safer.
12 I believe that it is.
13 Q. I'm going to put up -- you can take that down. I'm going
14 to put this up.
15 This is an exhibit that you have seen before, Dr.
16 Whidby, and I want to ask you a few questions. Using the
17 techniques that you have discussed here today, has Phillip
18 Morris been able to reduce the both volatile and non-volatile
19 nitrosamines, including tobacco specific nitrosamines --
20 A. Yes.

21 Q. -- in cigarettes?
22 A. Yes.
23 Q. Has Phillip Morris reduced the nitrosamines in
24 Marlboro?
25 A. Yes, we have.
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Whidby - Direct - Bleakley

1 Q. Has it reduced the nitrosamines in Benson & Hedges?
2 A. Yes, it has.
3 Q. Has it reduced the nitrosamines in Virginia Slims?
4 A. Yes, we have.
5 Q. Has it reduced the nitrosamines in all of the cigarettes
6 Phillip Morris sells?
7 A. Yes, it has.
8 Q. Using the techniques you have discussed here today, has
9 Phillip Morris reduced the aldehydes in all of its brands of
10 cigarettes?
11 A. Yes, it has.
12 Q. Has it reduced the polynuclear or cyclic
13 hydrocarbons --
14 A. Yes.
15 Q. -- in all of its cigarettes?
16 A. Yes, it has.
17 Q. Has Phillip Morris been able to reduce the metals,
18 including radioisotopes, in cigarettes?
19 A. Yes, it has.
20 Q. And finally, what is NOx?
21 A. Oxides of nitrogen.
22 Q. Has Phillip Morris reduced, by one or more of the methods
23 you have described here today, reduced the amounts of carbon
24 monoxide and nitrates of oxygen in all of its brands of
25 cigarettes?
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Whidby - Direct - Bleakley

1 A. Yes.
2 Q. Is Phillip Morris continuing to this date to try to
3 reduce by one or more of these methods that you have described
4 here today all of those things that are identified on this
5 exhibit as the key problem components?
6 A. Yes.
7 Q. I want to talk with you for a minute about a couple of
8 the efforts that Phillip Morris made, has made that may not
9 have been quite so successful.
10 The jury has heard a little bit about one of those
11 called NOD or NOD.
12 Did you tell us what that stands for?
13 A. NOD stands for naturally occurring denitrification.
14 Q. That is a project that Phillip Morris is engaged in --
15 A. Yes, we did.
16 Q. -- in the form of selective filtration?
17 A. Selective reduction.
18 Q. I mean selective reduction.
19 A. Yes.
20 Q. Then I mentioned earlier, I asked you earlier today
21 whether Phillip Morris tried something involving the use of a
22 cobalt filter.
23 A. Yes.
24 Q. Which of the four reduction methods would that fall
25 under?

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Whidby - Direct - Bleakley

1 A. Cobalt filter would be a selective reduction.
2 Q. I don't know when you were planning to take that break,
3 your Honor.

4 THE COURT: Yes, we can do that now. Take 10
5 minutes.

6 (Jury out at 11:15 a.m.)

7 (Recess.)

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Whidby - Direct - Bleakley

1 (Jury in at 11:25 a.m.)

2 DIRECT EXAMINATION

3 (Cont'd) BY MR. BLEAKLEY:

4 Q. Before we broke, Dr. Whidby, we were talking about the
5 NOD program. Can you describe briefly what the NOD program
6 is?

7 A. The NOD program as I said before is naturally occurring
8 denitrification and it was a discovery in one of our
9 processing plants that occasionally the existing process for
10 removing the nitrate from the process wasn't worked. So a
11 group of scientists tried to figure out what was going on and
12 discovered that there was a bacterial fermentation going on in
13 the process that was removing the nitrate. And then with that
14 discovery, they set out to try to harness that process to put
15 it back into the equipment to be able to remove the nitrate
16 from the RL process.

17 Q. During the that you were involved in this NOD project,
18 did you already have a process for removing some of the
19 nitrates from the smoke?

20 A. Yes.

21 Q. That was called crystallization?

22 A. Yes.

23 Q. How much of the nitrate -- first remind the jury what RL
24 is?

25 A. Reconstituted leaf. It's a process where we take small

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Whidby - Direct - Bleakley

1 pieces of tobacco, put that back together so that we can then

2 cut it up and put it back in the cigarette. The pieces are
3 too small to put them back in the cigarette before you run the
4 processes.
5 Q. You already had in place the process of crystallization?
6 A. Yes.
7 Q. How much of the nitrates was removed by crystallization
8 from the RL or reconstituted tobacco?
9 A. Around 60 percent.
10 Q. And the NOD program, the NOD program was an effort to
11 reduce all or some of the rest?
12 A. Yes, sir.
13 Q. Did it work?
14 A. On occasions but not very well.
15 Q. What do you mean?
16 A. It had a lot of problems. We weren't able to make the
17 product consistent from day-to-day, we couldn't start the
18 process well and the process when it was running would produce
19 on occasions material that was -- that didn't taste good,
20 didn't smoke good,.
21 Q. What ultimately Happened to the NOD project?
22 A. The NOD project was stopped.
23 Q. When the NOD project stopped, were you aware of any ideas
24 that had been tried to make it work?
25 A. That was the reason it was stopped, because all the
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1 scientists working on the project had exhausted all the ideas
2 on how to make it work.
3 Q. When the NOD project was terminated, did Phillip Morris
4 give up on trying to develop technology to remove nitrates
5 from tobacco?
6 A. No, it did not.
7 Q. Has Phillip Morris continued to this date to try to
8 develop technologies that would remove nitrates from tobacco?
9 A. Yes, we do.
10 Q. Cobalt filter, that was another project of selective
11 reduction that you tried?
12 A. Yes, it was.
13 Q. Can you describe very briefly for the jury what it was
14 and why you were doing it?
15 A. Cobalt is a catalyst, can be a catalyst and the concept
16 was to use the catalytic filter to remove carbon monoxide.
17 The process that the cobalt filter helps the catalyst with, it
18 helps in the process of converting carbon monoxide into carbon
19 dioxide. In other words, it would burn the carbon monoxide to
20 form the carbon dioxide. That was the basic concept with the
21 cobalt filter.
22 Q. Did it work?
23 A. No.
24 Q. Why not?
25 A. Although we had cobalt filters that were able to convert
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Whidby - Direct - Bleakley

1 some carbon monoxide into carbon dioxide, those filters were
2 made ineffective by the smoke stream that went through the
3 filter and by the water that was in the smoke stream.
4 Q. Now to another subject, Dr. Whidby, the testing of
5 products that you were working on to see whether in fact they
6 might be safer.

7 Are you familiar with the term biological testing?
8 A. Yes, I am.
9 Q. What is it?
10 A. Biological testing is the use of both in-vivo and
11 in-vitro techniques to evaluate whether or not something is
12 toxic.
13 Q. And although the jury has heard the term in-vivo and
14 in-vitro, would you tell us what that means again?
15 A. In in-vivo means using animals and in-vitro means using
16 laboratory techniques that do not involve animals.
17 Q. During the time that you've been with Phillip Morris, has
18 Phillip Morris engaged in biological testing for the
19 cigarettes it's worked on?
20 A. Yes.
21 Q. Both in Virginia and IMBIFO?
22 A. Yes.
23 Q. And outside research laboratories?
24 A. That's also correct.
25 Q. Has Phillip Morris conducted and sponsored biological

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Whidby - Direct - Bleakley

1 research in Richmond and IMBIFO and in outside laboratories on
2 animals?
3 A. Yes.
4 Q. On what kinds of cigarettes has Phillip Morris, and when
5 I say Phillip Morris, I'm including IMBIFO, done this kind of
6 testing, what kind of cigarettes?
7 A. Reference cigarettes and research cigarettes.
8 Q. Let's -- in the 1970s and 1980s and 1990s, while you were
9 at Phillip Morris, did Phillip Morris do testing on commercial
10 branded cigarettes like Marlboro and Winston, biological
11 testing?
12 A. No, we did not.
13 Q. You said they did biological testing on reference and
14 research cigarettes. Let's take reference cigarettes first.
15 What is a reference cigarette?
16 A. A reference cigarette is a cigarette that is made to very
17 exacting conditions so that those cigarettes can be used over
18 time to find out if a technique that you are using is
19 consistent. And this would be used at various laboratories in
20 this country and other countries, at industry laboratories, at
21 university laboratories, government laboratories. Those
22 cigarettes in general, the reference cigarettes, Kentucky
23 reference cigarettes were made by the University of Kentucky
24 in consultation with public health communities as well as the
25 industry.

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Whidby - Direct - Bleakley

1 Q. Is it a fact that Phillip Morris uses reference
2 cigarettes in its research both in the public health and
3 scientific community?
4 A. Yes, everybody uses reference cigarettes.
5 Q. So scientists other than those that work for the tobacco
6 companies do research on reference cigarettes?
7 A. Yes.
8 Q. And a doctor like Dr. Detrek Hoffman of the American
9 Health Foundation does work on reference cigarettes?
10 A. Yes.
11 Q. The National Cancer Institute?

12 A. Yes.
13 Q. Why does Phillip Morris and other scientists use
14 reference cigarettes to do research?
15 A. So that we can compare our results.
16 Q. Using the same cigarettes?
17 A. Yes.
18 Q. Are there all kinds of different reference cigarettes?
19 A. Yes.
20 Q. Are there non-filter reference cigarettes?
21 A. Yes.
22 Q. High tar and nicotine reference cigarettes?
23 A. Yes.
24 Q. Low tar and nicotine reference cigarettes?
25 A. Yes.

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Whidby - Direct - Bleakley

1 Q. Filtered cigarettes reference cigarettes?
2 A. Yes.
3 Q. Wide array of them?
4 A. That's correct, yes.
5 Q. Let's turn to the other kind of cigarettes on which you
6 said Phillip Morris has done biological testing.
7 You described those as research cigarettes. What are
8 research cigarettes?
9 A. Research cigarettes are cigarettes made by Phillip Morris
10 to evaluate various papers if you will, flavors, just various
11 aspects of the construction of cigarettes.
12 Q. The jury has sometimes heard the term control
13 cigarettes. Can you tell the jury what does that term mean?
14 A. Control cigarettes would be -- in general terms, a
15 control cigarette would be a cigarette that would not have the
16 modification on it and the test cigarette would be the
17 cigarette that would have that particular modification on it.
18 Q. Are reference cigarettes commercial branded cigarettes
19 like Winston and Marlboro?
20 A. No, they are not.
21 Q. Are research cigarettes commercial branded cigarettes
22 like Winston and Marlboro?
23 A. No, they are not.
24 Q. Are reference cigarettes whole product cigarettes like
25 Marlboro or Winston?

ALLAN R. SHERMAN, C.S.R., RPR, Official Court Reporter

4811

Whidby - Direct - Bleakley

1 A. No.
2 Q. Are research cigarettes whole products cigarettes like
3 Winston and Marlboro?
4 A. No.
5 Q. The jury has sometimes heard the use of the word
6 conventional cigarettes. What is a conventional cigarette?
7 A. Conventional cigarettes are what we talked about before,
8 cigarettes that burn tobacco, generate the energy or the heat,
9 drive off the smoke, flavors, nicotine from the cigarette,
10 from the tobacco.
11 Q. So would that include research cigarettes?
12 A. Yes.
13 Q. Reference cigarettes?
14 A. Yes.
15 Q. And commercial branded cigarettes?
16 A. Yes.

17 Q. And we've also heard the term American blended
18 cigarette. What are American blended cigarettes?
19 A. American blended cigarettes are cigarettes that are made
20 be with 3 types of tobacco, a burly tobacco growing in western
21 Virginia, some in West Virginia, Tennessee and Western North
22 Carolina. Tobacco called flukier tobacco, principally grown
23 in Virginia, North Carolina, South Carolina and Georgia, and a
24 tobacco that is called oriental tobacco which is grown in
25 Turkey and Greece, in that region of the world.

ALLAN R. SHERMAN, C.S.R., RPR, Official Court Reporter

4812

Whidby - Direct - Bleakley

1 Q. It refers to the different kinds of tobaccos that are
2 used?
3 A. Blend of those tobaccos, yes.
4 Q. Regardless whether it's a research cigarette or a
5 reference cigarette or a commercially branded cigarette?
6 A. Correct.
7 Q. Does the fact that a cigarette or a test of cigarettes
8 refers to conventional cigarettes necessarily mean that they
9 are talking about commercial branded cigarettes?
10 A. No.
11 Q. Does the fact that a person or a document or a test
12 refers to American blended cigarettes necessarily mean that
13 they are talking about commercially branded cigarettes?
14 A. No.
15 Q. By the way, in the 26 years that you were at Phillip
16 Morris or since you've been a consultant, did you ever see or
17 hear of an agreement among the tobacco companies to refrain
18 from doing biological testing on animals in the United States?
19 A. No.
20 Q. Did you ever see or hear of an agreement among the
21 tobacco companies to do biological testing of any kind on
22 commercial cigarettes?
23 A. No.
24 Q. Did you ever see or hear of an agreement between the
25 tobacco companies to refrain from any kind of biological

ALLAN R. SHERMAN, C.S.R., RPR, Official Court Reporter

4813

Whidby - Direct - Bleakley

1 testing?
2 A. No.
3 Q. Or any kind of testing on cigarettes?
4 A. No.
5 Q. When you were at Phillip Morris, during the entire time
6 you were at Phillip Morris, Phillip Morris did in fact conduct
7 biological tests?
8 A. Yes, we did.
9 Q. Both in Richmond -- not both, in Richmond, is that right?
10 A. Yes.
11 Q. In IMBIFO in Germany?
12 A. Yes.
13 Q. And at outside laboratories?
14 A. Yes.
15 Q. Did it conduct responsive biological testing on animals
16 in the United States?
17 A. Yes.
18 Q. During the entire time you were there?
19 A. Yes.
20 Q. Did you ever at any time that you were associated with
21 Phillip Morris, did you ever hear of or see the destruction of

22 any biological tests done by IMBIFO?
23 A. No.
24 Q. Did you ever see or hear of the destruction of any kinds
25 of tests done by IMBIFO including tests on commercial
ALLAN R. SHERMAN, C.S.R., RPR, Official Court Reporter

4814

Whidby - Direct - Bleakley

1 products?
2 A. No.
3 Q. Did you ever see of or hear, see or hear of any
4 biological tests that were conducted by IMBIFO that compared
5 various whole products, commercial brands of cigarettes like
6 Winston and Marlboro?
7 A. No, I did not.
8 Q. Just to remind the jury what IMBIFO is, tell us what
9 IMBIFO is?
10 A. IMBIFO is a laboratory that is owned by Phillip Morris
11 that is in Cologne, Germany that has the responsibility of
12 doing volatile testing.
13 Q. Did you have access to IMBIFO reports and tests when you
14 were there?
15 A. Yes, I did.
16 Q. Did you see them frequently?
17 A. Yes, I did.
18 Q. Finally, earlier today, Dr. Whidby, you talked about some
19 of the tests that had been done on the electrically heated
20 cigarette, the Accord, do you remember that?
21 A. Yes.
22 Q. Were those tests published anywhere?
23 A. Yes.
24 Q. Where were they published?
25 A. At a meeting of the Society of Toxicology.
ALLAN R. SHERMAN, C.S.R., RPR, Official Court Reporter

4815

Whidby - Direct - Bleakley

1 Q. When was that?
2 A. In the spring of '98.
3 Q. At this meeting of the Society of -- this was a public
4 meeting?
5 A. Yes.
6 Q. At this meeting of the Society of Toxicology, were
7 different kinds of exhibits used in the presentation?
8 A. Yes, there were.
9 MR. BLEAKLEY: I need to take a second to put up a
10 couple of these easels, your Honor.
11 (Pause.)
12 These 4 posters, your Honor, are collectively BCD 258
13 which was admitted yesterday.
14 THE COURT: Yes, they were not admitted but I'm
15 admitting them now.
16 MR. BLEAKLEY: Thank you.
17 (So marked Defendant's Exhibit BCD 258 in evidence.)
18 Q. Now, Dr. Whidby, can you come down real quickly and take
19 a look at these 4 posters that have been identified as BCD 258
20 and tell us whether these are the documents, the presentation
21 that was made to the Society of Toxicology in March 1998?
22 A. Yes, they are.
23 Q. Were you personally involved in the creation of these
24 posters and in the work surrounding them?
25 A. Yes, I was.
ALLAN R. SHERMAN, C.S.R., RPR, Official Court Reporter

Whidby - Direct - Bleakley

- 1 Q. Do these 4 posters contain or refer in any way to any
2 biological testing on whole commercial products like Marlboro
3 and Winston that was done by IMBIFO?
4 A. No, they do not.
5 Q. Do they refer to or contain any biological testing that
6 was done by anybody on whole commercial products like Marlboro
7 and Winston?
8 A. No.
9 Q. Do they contain or refer to any biological testing that
10 was done by IMBIFO or anyone else 16, 20 years ago?
11 A. No, they do not.
12 Q. When were these prepared?
13 A. They were prepared in the spring of '98.
14 Q. When were the tests done that are summarized on them?
15 A. The tests were done in the mid-'90s, starting '94 or
16 '95.
17 Q. Am I right that this involved the Accord cigarette?
18 A. Yes, or the prototype.
19 Q. Let's take them one by one.
20 The very first one here is entitled evaluation of
21 electrically heated cigarette, that is the Accord prototype,
22 is that correct?
23 A. That's correct, yes.
24 Q. Does this first one say anything about the testing of
25 commercial whole product cigarettes?

ALLAN R. SHERMAN, C.S.R., RPR, Official Court Reporter

Whidby - Direct - Bleakley

- 1 A. No, sir, it does not.
2 Q. How do you know that?
3 A. Because I was involved in this, in putting this
4 together.
5 Q. The second poster is entitled Equi-effect Design for
6 Subchronic Inhalation Toxicity Studies Comparing conventional
7 and Novel Cigarettes.
8 Do you know about that one, too?
9 A. Yes, sir, I do.
10 Q. What kind of cigarettes is this poster talking about?
11 A. It's talking about the electrically heated cigarette and
12 the Kentucky reference cigarette.
13 Q. How do you know about that?
14 A. I was there, I dealt with the work.
15 Q. Does this poster say anything about the testing of
16 commercial branded or whole product cigarettes like Marlboro
17 and Winston?
18 A. No.
19 Q. Does it make comparisons of tests done on commercial
20 product?
21 A. No, it does not.
22 Q. Does the first one?
23 A. No.
24 Q. The third poster entitled Discrimination of Cigarette
25 Mainstream Smoke with the Neutral Red Uptake Cytotoxicity

ALLAN R. SHERMAN, C.S.R., RPR, Official Court Reporter

Whidby - Direct - Bleakley

- 1 Asset, did I get that right?
2 A. Yes.

3 Q. What kind of cigarettes is this third poster talking
4 about?
5 A. It's talking about some research cigarettes and a
6 reference cigarette.
7 Q. Also the electrically heated cigarette?
8 A. That's one of the research cigarettes.
9 Q. How do you know that?
10 A. I was there. I also helped do the work, put the charts
11 together.
12 Q. Does this poster, the third poster contain or refer to in
13 any way any test that was done on whole product commercial
14 cigarettes like Marlboro and Winston?
15 A. No, it does not.
16 Q. The fourth one is entitled Discrimination of Cigarette
17 Mainstream Smoke Condensates With The Salmonella Reverse
18 Mutation Assay.
19 Were you involved in that one?
20 A. Yes.
21 Q. What kind of cigarettes tests are being talked about in
22 this fourth one?
23 A. The cigarettes that are in the fourth one are the, again
24 the research cigarettes and a reference cigarette.
25 Q. And an electrically heated cigarette and the prototype?
ALLAN R. SHERMAN, C.S.R., RPR, Official Court Reporter

4819

Whidby - Direct - Bleakley

1 A. Yes.
2 Q. Do any of these test have anything to do with any
3 commercial whole product cigarette like Marlboro or Winston?
4 A. No, sir, they do not.
5 Q. One or more of these 4 posters refers to an article by
6 someone named Steele in 1995, do you see that?
7 A. Yes, sir, here and here.
8 Q. Do you know what this Steele person is?
9 A. Yes, sir, I do.
10 Q. What is the full name and who is the person?
11 A. A researcher at R.J. Renyolds Tobacco Company.
12 Q. Does the article by -- do you remember her first name?
13 A. I don't remember her first name.
14 Q. Does the article by Ms. Steele have anything to do with
15 the research on cigarettes that was conducted in this case?
16 A. No, it does not.
17 Q. Why do these posters cite that Steele article?
18 A. What they do is cite what she says in her article
19 regarding the -- what she does is to say in her article that
20 the Kentucky reference 1R4D cigarette is representative of the
21 U.S. market as far as tar and nicotine goes.
22 Q. Does the fact that these posters cite the 1995 article by
23 Steele suggest in any way that commercial whole product
24 cigarettes were tested here?
25 A. No, sir, it does not.

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4820

Whidby - Direct - Bleakley

1 Q. Does the fact that these posters say that the results are
2 normalized to that of a reference cigarette in any way suggest
3 that commercial whole product cigarettes were tested?
4 A. No.
5 Q. Does the fact that these posters say that one of the
6 methods used is to allow one to discriminate between
7 cigarettes with distinct differences suggest that commercial

8 whole product cigarettes were tested?
9 A. No.
10 Q. Does the fact that these posters conclude that the
11 electrically heated cigarette performed better than
12 conventional cigarettes in certain tests mean that the
13 electrically heated cigarette was compared to commercial whole
14 product cigarettes like Marlboro or Winston?
15 A. No.
16 Q. Does the fact that these posters say that the results
17 when compared with American blended cigarettes tell you that
18 these were -- that commercial whole product cigarettes were
19 used in testing?
20 A. No.
21 Q. Let me ask you this, Dr. Whidby -- you can go back to the
22 stand.
23 What is the approximate range of tar in commercial
24 cigarettes on the market today?
25 A. The range of tar today goes from less than .5 milligrams
ALLAN R. SHERMAN, C.S.R., RPR, Official Court Reporter

4821

Whidby - Direct - Bleakley
1 of tar up to 27, 28 milligrams of tar.
2 Q. What was the range of the American blend research
3 cigarettes that were used and compared in these tests?
4 A. They were all right around 10 milligrams.
5 Q. Is there anything inconsistent between the results of the
6 tests that were done and reported on BCD 258 and any prior
7 tests done by Phillip Morris or IMBIFO or any laboratory
8 employed by Phillip Morris on any kinds of cigarettes?
9 MR. HEFTER: Your Honor, objection, lack of
10 foundation.
11 THE COURT: I'll allow it.
12 A. No.
13 Q. Is it fair to say, Dr. Whidby, that almost all of the
14 time that you've spend with Phillip Morris and in your
15 consulting role for the last 3 years has been spent on the
16 effort to develop a potentially safer cigarette?
17 A. Yes, there has.
18 Q. Has there ever been any doubt in your mind about Phillip
19 Morris's commitment to develop a potentially safer cigarette?
20 A. Never.
21 MR. BLEAKLEY: I have nothing further.
22 MR. HEFTER: Can we have a few minutes, your Honor.
23 THE COURT: Sure, take a short break.
24 (Jury out at 11:55 a.m.)
25 THE COURT: Do you want these placards up or down?
ALLAN R. SHERMAN, C.S.R., RPR, Official Court Reporter

4822

Whidby - Direct - Bleakley
1 MR. HEFTER: We are debating that now.
2 MR. BLEAKLEY: I offered to take them. He told me
3 to leave them.
4 (Recess.)
5 (Continued on next page.)
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ALLAN R. SHERMAN, C.S.R., RPR, Official Court Reporter

4823

Whidby - Direct - Bleakley

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ALLAN R. SHERMAN, C.S.R., RPR, Official Court Reporter

4824

Whidby - Direct - Bleakley

1 (The jury enters the courtroom.)
2 MR. HEFTER: Thank you, your Honor. Good afternoon,
3 everybody.
4 JURORS: Good afternoon.
5 CROSS-EXAMINATION
6 BY MR. HEFTER:
7 Q. Good afternoon, Dr. Whidby.
8 A. Good afternoon.
9 Q. We met out in the hall earlier, right?
10 A. Yes.
11 Q. That's the first time we ever met, right?
12 A. Yes.
13 Q. Just the last part of your testimony in response to
14 Mr. Bleakley's questions you talked a lot about biological
15 testing at Philip Morris, correct?
16 A. Yes.
17 Q. Now, you're not a biologist, are you?

18 A. No, I'm not.
19 Q. Biological testing is not your area of expertise --
20 A. No, it's not.
21 Q. -- is that correct?
22 While you were at Philip Morris for 26 years -- is
23 that correct?
24 A. That's correct.
25 Q. -- you were never in the biological testing department at
M. BRYMER, RPR, OCR

4825

Whidby-cross-Hefter

1 Philip Morris; is that correct?
2 A. No, sir, I was not.
3 Q. Now, currently, you no longer are employed by Philip
4 Morris?
5 A. Other than as a consultant.
6 Q. You're a former employee of the company?
7 A. Yes.
8 Q. You retired in 1998?
9 A. Yes.
10 Q. And you started working there in 1972, correct?
11 A. That's correct, yes.
12 Q. And in that 28 years -- is it 28 years or 26 you worked
13 for the company?
14 A. Full time I was working 26 years.
15 Q. I'm sorry.
16 Twenty-six years that you were working at the
17 company, you never testified in any smoking health litigation
18 on behalf of the company; is that correct?
19 A. That is correct.
20 Q. During your tenure you were never asked by the company's
21 lawyers to testify in any smoking health litigation?
22 A. When I was employed at Philip Morris I did give a
23 deposition, some depositions relative to accident propensity.
24 If you're not including that as smoking and health.
25 Q. That's when somebody is injured when the cigarette falls
M. BRYMER, RPR, OCR

4826

Whidby-cross-Hefter

1 on the floor and somebody's house goes on fire, something like
2 that?
3 A. Yes.
4 Q. I'm talking about when somebody's lungs are damaged or
5 someone has emphysema, you were never asked by the company's
6 lawyers to testify in a case like that, were you?
7 A. No, I was not.
8 Q. It was only after you retired that you became a
9 testifying witness for the company; is that correct?
10 A. Yes, that is correct, in that area.
11 Q. Since your retirement you've given testimony in four
12 cases, you said yesterday?
13 A. I believe that's correct, yes.
14 Q. And you understand that you are here as a fact witness;
15 is that correct?
16 A. That's correct.
17 Q. You are not here as an expert witness?
18 A. No, sir, I'm not.
19 Q. You haven't provided to the plaintiffs in the case any
20 expert disclosure prior to your testimony here today?
21 A. No, not on this case, no.
22 Q. Other than Philip Morris, do you do any consulting work

23 for any other company?
24 A. No, sir, I do not.
25 Q. So, all of your consulting work on an annual basis since
M. BRYMER, RPR, OCR

4827

Whidby-cross-Hefter

1 you retired has been for Philip Morris; is that correct?
2 A. That's correct.
3 Q. As a consultant, are you getting paid for your time here
4 today?
5 A. Yes, I am.
6 Q. What's the going rate today?
7 A. Today I get \$2,200.
8 Q. That's 2,200 hours for today?
9 A. Dollars.
10 Q. I'm sorry.
11 \$2,200?
12 A. It probably seems like 2,200 hours.
13 Q. For you and me both.
14 \$2,200 for your testimony here today?
15 A. Yes, sir, right.
16 Q. You prepared for your testimony?
17 A. Yes, I have.
18 Q. During the entire time you're preparing for your
19 testimony you're getting paid \$2,200 a day?
20 A. Correct.
21 Q. Now, I think you said yesterday that you had been paid
22 over at least in the past year approximately \$100,000 by
23 Philip Morris for your consulting time?
24 A. That is correct, yes.
25 Q. Approximately 50 percent of that time has been devoted to
M. BRYMER, RPR, OCR

4828

Whidby-cross-Hefter

1 testifying in litigation; is that correct?
2 A. That is my best guess. I don't have it broken down.
3 Q. So, the rate has been 2,200 hours -- \$2,200 during that
4 entire period of time?
5 A. No, it has not.
6 Q. It has been increased recently?
7 A. Not recently, no.
8 Q. When was it increased?
9 A. After my -- after the first case I testified which was
10 about 18 months ago now, I asked for more money for doing work
11 like this. Prior to that my rate was \$1,400 a day for
12 everything.
13 Q. So, after you provided testimony in that case, Philip
14 Morris increased your compensation as a consultant on an
15 hourly basis?
16 A. I didn't realize how much it involved as far as stress
17 goes to do that so I did ask for additional compensation.
18 Q. Upon your retirement you also received a compensation
19 package or severance package?
20 A. Yes, I did.
21 Q. After receiving that compensation package you became a
22 testifying witness for the company?
23 A. Yes.
24 Q. Now, your first position as Philip Morris was associate
25 scientist, correct?

M. BRYMER, RPR, OCR

Whidby-cross-Hefter

- 1 A. That's correct.
2 Q. You were in that position for approximately a year; is
3 that correct?
4 A. That's about right.
5 Q. And, then, after that period of time you were given a
6 different title?
7 A. I was promoted to research scientist.
8 Q. What is a research scientist?
9 A. A research scientist is a one level promotion.
10 Q. At this time you worked at Richmond?
11 A. Yes.
12 Q. Throughout your entire career as a researcher at Philip
13 Morris you worked at Richmond?
14 A. Always.
15 Q. That's where Philip Morris' Research and Development
16 Center is located?
17 A. That's correct.
18 Q. And the Research and Development Center, when you first
19 started working at Philip Morris, was broken down into
20 different directorates; is that correct?
21 A. That's correct.
22 Q. What directorate were you in?
23 A. I was in the research directorate.
24 Q. You weren't involved in any biological testing at that
25 time in the research directorate, were you?

M. BRYMER, RPR, OCR

Whidby-cross-Hefter

- 1 A. No, I was not.
2 Q. Now, biological testing, it is possible to do a
3 biological test to determine whether a cigarette causes
4 cancer; is that correct -- let me rephrase that.
5 Is it possible to do an in vivo biological test on
6 animals to determine whether cigarette smoke causes cancer in
7 the animals that are tested?
8 A. It is not my area of expertise, but in general terms
9 there are certain tests that the biologists use, again not my
10 area of expertise, that indicates whether or not the cigarette
11 is or cigarette design is worse than another cigarette design.
12 Q. In that test you could test as an end point
13 carcinogenicity?
14 A. I think there are certain tests that the end point is
15 carcinogenicity.
16 Q. In certain tests you can test for immunogenicity?
17 A. Yes.
18 Q. Certain tests you can test for damage to fetal tissue?
19 A. Right.
20 Q. Or teratogenicity; is that right?
21 A. You're more of an expert than I am, I guess.
22 Q. Now, just so I understand your testimony correctly, from
23 the day that you started at Philip Morris in 1972 -- what
24 month was that; do you recall?
25 A. I believe that was August, best of my recollection.

M. BRYMER, RPR, OCR

Whidby-cross-Hefter

- 1 Q. -- until the time that you left Philip Morris as an
2 employee in 1998, you have seen no data on biological tests of
3 commercial products like Marlboro?

4 A. I've never seen data on commercial products like
5 Marlboro, biological tests.
6 Q. This is a Marlboro pack of cigarettes; is that correct?
7 A. Yes, it is.
8 MR. HEFTER: I'm just going to mark this, your Honor,
9 as Whidby Exhibit 1.
10 Q. This is what's called Marlboro Reds; is that correct?
11 A. Yes, it is.
12 Q. Marlboro Full Flavor?
13 A. Right.
14 Q. Currently what is the tar level in Marlboro Red?
15 A. 15, 16 milligrams.
16 Q. During your entire tenure at Philip Morris, you've never
17 seen a test comparing a reference cigarette, another type of
18 cigarette, a prototype cigarette compared to a Marlboro
19 cigarette sold on the market and smoked by Americans in the
20 United States?
21 A. I've never seen a biological test that Philip Morris
22 performed that did that.
23 Q. That would be the same if I showed you a package of
24 Marlboro Lights; is that correct?
25 A. Yes.

M. BRYMER, RPR, OCR

4832

Whidby-cross-Hefter

1 Q. That would be the same if I showed you a package of
2 Marlboro Ultra Lights?
3 A. That's correct.
4 Q. Now, I would just like for a minute to see where you
5 stood in the organizational structure and let's say
6 approximately 1976. Do you recall what directorate you were
7 in in 1976?
8 A. I believe I was a research director at that time.
9 MR. HEFTER: Can I have the 1976 organizational
10 chart, please. Your Honor this is PTX9896.
11 Q. Does this accurately represent the management of the
12 Research and Development Department in 1976 to the best of
13 your knowledge?
14 A. To the best of my knowledge, yes, it does.
15 Q. On the left-hand side it says H. Wakeham. Do you see
16 that?
17 A. Yes, I do.
18 Q. Who is H. Wakeham or who was H. Wakeham?
19 A. His title at that time was corporate vice president.
20 That's what it says.
21 Q. He was an officer of the company?
22 A. I don't know whether he was an officer or not, but he was
23 in a high level position, corporate vice president.
24 Q. Based on your understanding, does vice president of the
25 company mean you're an officer?

M. BRYMER, RPR, OCR

4833

Whidby-cross-Hefter

1 A. Not necessarily.
2 Q. Now, was Dr. Wakeham the top scientist at Philip Morris
3 at this point in time in 1976?
4 A. I guess you could probably have thought of him as such,
5 yes.
6 Q. Now, there is a Dr. R.B. Seligman right below that?
7 A. Yes.
8 Q. Who is Dr. Seligman?

9 A. Dr. Seligman was vice president of research and
10 development.
11 Q. Dr. Wakeham, was he based in Richmond as well at this
12 time?
13 A. I believe he was yes, yes.
14 Q. What was Dr. Seligman's role compared to Dr. Wakeham's
15 role?
16 A. Dr. Seligman's role was manager of -- or vice president
17 involved of all research and development.
18 Q. In terms of the corporate structure, was Dr. Wakeham more
19 senior to Dr. Seligman?
20 A. You know, I really don't know whether he was or not.
21 Q. Right to the right there there are three lines and there
22 is an R. Fagan, W.A. Farone and T.S. Laszlo. Did I pronounce
23 his name correctly?
24 A. Yes.
25 Q. That's Dr. Fagan; is that correct?

M. BRYMER, RPR, OCR

4834

Whidby-cross-Hefter

1 A. Yes, sir.
2 Q. And he was a fairly senior scientist at Philip Morris
3 during this time period?
4 A. Yes.
5 Q. And then there's Dr. Farone?
6 A. Yes.
7 Q. And he is a fairly senior scientist at the company at
8 this time?
9 A. Yes.
10 Q. There is a T.S. Laszlo. Who is T.S. Laszlo?
11 A. Dr. Laszlo was a physical scientist.
12 Q. If we skip down below there appear to be three
13 directorates at this point in time. The director of research
14 is T.S. Osdene. Do you see that?
15 A. Yes.
16 Q. And you were in Dr. Osdene's group at the time?
17 A. Yes.
18 Q. You were in the Analytical Services Division?
19 A. That's right.
20 Q. You reported to a Mr. or Dr. F. Will?
21 A. That's correct. He was the manager of the division.
22 Q. There is an asterisk next to his name. Does that
23 indicate he has a Ph.D.?
24 A. Yes.
25 Q. I will call him doctor.

M. BRYMER, RPR, OCR

4835

Whidby-cross-Hefter

1 You reported to Dr. Will?
2 A. I reported to a person who reported to Dr. Will, yes.
3 Q. Let's see if we can move ahead to the page where your
4 name appears. Your name is right there, Dr. Whidby; is that
5 correct?
6 A. That is correct, yes.
7 Q. You were part of the NMR group at the time?
8 A. That's right.
9 Q. I think yesterday you referred to the -- I know it is
10 magnetic resonance.
11 A. Nuclear magnetic resonance.
12 Q. Thank you very much.
13 You reported to Mr. Bourles at the time?

14 A. Yes.
15 Q. Mr. Bourles reported to Mr. Will?
16 A. That's correct.
17 Q. Mr. Will reported to Dr. Osdene?
18 A. That's correct.
19 Q. And Dr. Osdene reported to Dr. Seligman, correct?
20 A. That's correct.
21 Q. You're four rungs below Dr. Seligman at this time; is
22 that correct?
23 A. I trust your math.
24 Q. In the NMR group, you were there to determine to use this
25 new -- to determine what kind of chemical compounds are in

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Whidby-cross-Hefter

1 tobacco smoke?
2 A. Yes.
3 Q. At the time your group knew there was benzo(a)pyrene in
4 the cigarette smoke?
5 A. Yes.
6 Q. At that time Philip Morris knew there was other
7 polycyclic aromatic hydrocarbons in cigarette smoke; is that
8 correct?
9 A. That's correct, yes.
10 Q. During that time period Philip Morris knew there was
11 carbon monoxide in tobacco smoke; is that correct?
12 A. Yes.
13 Q. During that period of time Philip Morris knew there were
14 metals; is it radioisotopic metals?
15 A. Heavy metals.
16 Q. Heavy metals. Philip Morris knew that at the time?
17 A. Yes.
18 Q. And at the time Philip Morris knew there were tobacco
19 specific nitrosamines in tobacco smoke?
20 A. What year is this chart?
21 Q. I believe it is 1976.
22 A. By '76, yes.
23 Q. And during that time period, 1976, Philip Morris never
24 told the American public there were dangerous chemical
25 compounds in smoke, did it?

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Whidby-cross-Hefter

1 A. I don't know what Philip Morris may or may not have told
2 the American public.
3 Q. You don't know whether they told the American public or
4 not?
5 A. No, I do not.
6 Q. You have no knowledge about that?
7 A. No.
8 Q. Let's jump ahead to 1979. You changed departments in
9 1979, correct?
10 A. '78 or '79.
11 MR. HEFTER: Your Honor, I would move into evidence
12 the previous exhibit, PTX9896.
13 THE COURT: Admitted.
14 Q. Dr. Whidby, does this accurately reflect the management
15 of the Research and Development Department as of October 1st,
16 1979?
17 A. I believe it does, yes.
18 Q. And at this point there are four directorates; is that

19 correct?
20 A. That's correct.
21 Q. There is a director of development?
22 A. Yes.
23 Q. That's Dr. Gannon?
24 A. Yes, it is.
25 Q. And then there is a director of research, and that's
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Whidby-cross-Hefter

1 still Dr. Osdene, correct?
2 A. That's correct.
3 Q. And there is a director of applied research, Dr. Farone,
4 correct?
5 A. Correct.
6 Q. And then there is a director of technical services, a
7 Mr. Thompson; is that correct?
8 A. That's also correct.
9 Q. Mr. Thompson is not a doctor; is that correct?
10 A. That's correct.
11 Q. He is an engineer?
12 A. Yes, he was.
13 Q. And Dr. Wakeham and Dr. Seligman still sit at the top of
14 the Research and Development Center at this point in time?
15 A. Yes, they are still in the same position.
16 Q. Is Dr. Wakeham alive today?
17 A. I believe he is, yes.
18 Q. Is Dr. Seligman alive today?
19 A. I don't think so, no.
20 Q. What about Dr. Osdene, is he alive today?
21 A. Yes, he is.
22 Q. He lives in Virginia, right?
23 A. I believe he does.
24 Q. Does he live near you?
25 A. No, he does not.

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Whidby-cross-Hefter

1 Q. Does he live near the Richmond area?
2 A. Say it again.
3 Q. Does he live near the Richmond area?
4 A. I believe he does, yes.
5 Q. Now, at this time you have now moved to the Computer
6 Applications Department; is that correct?
7 A. That's correct.
8 Q. And that's listed on the bottom there and there is a
9 Mr. Watson; is that correct?
10 A. That is correct.
11 Q. You reported to Mr. Watson at this point in time?
12 A. Yes, I did.
13 Q. During this time period you were developing computer
14 software and other type of computer technology to record the
15 data of the Research and Development Department; is that
16 correct?
17 A. Computer applications, yes.
18 Q. You weren't doing any biological testing at this time?
19 A. No, I was not.
20 Q. You weren't doing any marketing for the company at that
21 time?
22 A. No, I was not.
23 Q. You weren't doing any product development work for the

24 company at that time?
25 A. Yes, I was.

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Whidby-cross-Hefter

1 Q. What product development work?
2 A. The work I was involved in in the Computer Applications
3 Division was part of overall product development work.
4 Q. You weren't developing the products, you were just taking
5 the data and putting it into the computer system?
6 A. As part of the product development area, yes.
7 Q. I'm looking through the board where Dr. Whidby appears.
8 Okay.
9 So, here you're the manager of the Applications
10 Software Group?
11 A. Yes.
12 Q. You reported to Mr. Watson?
13 A. That's correct.
14 Q. And Mr. Watson reported to Dr. Farone; is that correct?
15 A. Yes.
16 Q. So, at this point you were two rungs below Dr. Farone; is
17 that correct?
18 A. That is correct, yes.
19 Q. And you were in this group until 1981; is that correct?
20 A. That is correct, yes.
21 Q. And in 1981 your department changed; is that correct?
22 A. Right.
23 Q. And you became the manager of the Biomechanical Group?
24 A. Biomaterial science.
25 Q. Thank you.

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Whidby-cross-Hefter

1 You were in that position until at least 1984; is
2 that correct, Biomaterials Group?
3 A. Yes.
4 MR. HEFTER: Can we see the 1982 organizational
5 chart. Your Honor, I would move into evidence PTX9897, which
6 is the October 1, 1979 Philip Morris organizational chart for
7 research and development.
8 THE COURT: Admitted.
9 MR. HEFTER: If you can blow this up, I want to get
10 the date of this document.
11 Q. This document is dated July 30th, 1982. Dr. Whidby, does
12 this accurately reflect the management of the Applied Research
13 Group at this point in time?
14 A. I believe it does, yes.
15 Q. And you were the manager of biomaterial science; is that
16 correct?
17 A. That's correct.
18 Q. And at the top there is a Max Hausermann?
19 A. Correct.
20 Q. Who is Max Hausermann?
21 A. Dr. Hausermann was vice president of research and
22 development at that time.
23 Q. He was on top of the entire Research and Development
24 Group at this point in time?
25 A. That's correct, yes.

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Whidby-cross-Hefter

- 1 Q. Dr. Farone is still the director of applied research; is
2 that correct?
3 A. Right.
4 Q. You reported directly to Dr. Farone?
5 A. Correct.
6 Q. In your opinion was Dr. Farone a good boss?
7 A. Yes.
8 Q. You and Dr. Farone socialized on many occasions at that
9 time; is that right?
10 A. Several occasions, yes.
11 Q. Now, during this time period, and this is from 1981 until
12 after Dr. Farone left the company, is that correct --
13 A. Sorry.
14 Q. -- you were in that position?
15 A. Yes, I was in that position, that's correct.
16 Q. You worked on denitrification project during that time
17 period, is that correct?
18 A. Yes.
19 Q. Prior to 1981 you hadn't worked in the denitrification
20 project; is that correct?
21 A. Denitrification, no, I had not.
22 Q. And during this time period you were aware that the
23 directors of research would regularly meet; is that correct?
24 A. Yes, I was.
25 Q. And you were not a regular participant in those meetings;

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Whidby-cross-Hefter

- 1 is that correct?
2 A. No, I was not.
3 Q. You weren't a director at that time?
4 A. That's correct.
5 Q. And prior to 1981, you didn't attend directors meetings
6 either; is that correct?
7 A. No, I did not.
8 Q. You are also aware during this time period executives
9 from New York and lawyers from New York sometimes came down
10 and met with the researchers at the Philip Morris R&D
11 facility; is that correct?
12 A. We had meetings with people from New York at Richmond,
13 yes.
14 Q. Prior to 1981, you never attended any of those meetings;
15 is that correct?
16 A. Yes, I did. I did attend some of those meetings.
17 Q. Not all of them, right?
18 A. No, not all of them.
19 Q. Now, I would like to show you --
20 THE COURT: Is this an exhibit, separate one?
21 MR. HEFTER: Yes, it is, your Honor. I will move its
22 admission.
23 THE COURT: What was the number?
24 MR. HEFTER: 9898, your Honor.
25 THE COURT: All right, it is admitted.

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Whidby-cross-Hefter

- 1 MR. HEFTER: If I can have PTX9784.
2 Q. Have you ever seen this document before, Dr. Whidby?
3 A. Yes.
4 Q. When was the last time you saw this document?

5 A. A few days ago.
6 Q. You were shown the document by your lawyers?
7 A. In preparation, yes.
8 Q. Preparation for your testimony here today?
9 A. I believe so, yes.
10 Q. Now, you weren't at this meeting, were you?
11 A. No, sir, I was not.
12 Q. And this is an October 15th, 1979 Richmond product
13 meeting; is that correct?
14 A. That's what it says.
15 Q. And your name is not listed of those people who were
16 present; is that correct?
17 A. That's correct.
18 Q. And Dr. Farone is listed there as present; is that
19 correct?
20 A. That is correct.
21 MR. HEFTER: Scroll down the document, please.
22 Q. There is a reference to Trinity. That refers to Project
23 Trinity; is that correct?
24 A. I believe it probably does, yes.
25 Q. What is Project Trinity, do you know?

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Whidby-cross-Hefter

1 A. Project Trinity was a project to develop low tar
2 cigarettes.
3 Q. So, you're not -- okay. And the Project Trinity was the
4 code name for the Cambridge cigarette product; is that
5 correct?
6 A. I think the cigarettes that were developed under the
7 Project Trinity, some of those ended up being part of
8 Cambridge.
9 Q. You have no knowledge, since you weren't there, as to
10 what was discussed at this meeting about the marketing plans
11 for Cambridge?
12 A. I was not at the meeting, no.
13 Q. You mentioned yesterday that at the time you left the
14 company that you had become a fellow; is that correct?
15 A. That's correct.
16 Q. And there was one other gentleman -- I presume it was a
17 gentleman. There was another person who was a fellow as well?
18 A. That's correct.
19 Q. Who's that?
20 A. Dr. Lilly.
21 Q. Dr. Cliff Lilly?
22 A. That's correct.
23 Q. Now, as a fellow, were you an officer of the company?
24 A. No.
25 MR. HEFTER: If I can have the demo 000479.

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Whidby-cross-Hefter

1 THE COURT: What do you want to do about 9784?
2 MR. HEFTER: I would like to have it admitted, your
3 Honor.
4 THE COURT: Admitted.
5 MR. HEFTER: Thank you.
6 Q. Now, you prepared this demonstrative to show the four
7 basic areas where Philip Morris was working to make cigarettes
8 safer; is that correct?
9 A. Yes, sir.

10 Q. Two ways listed is general reduction and selective
11 reduction; is that correct?
12 A. That's correct.
13 Q. Is it your testimony that by using general reduction
14 techniques and selective reduction techniques Philip Morris
15 has reduced the tar and nicotine yields in cigarettes?
16 A. Yes.
17 Q. That's how you get to demo 001852, please.
18 A. I'm sorry, what's the question?
19 Q. I will get there. Sorry.
20 This document shows -- it is your testimony this
21 document shows average tar and nicotine yields for cigarettes
22 sold in the United States had reduced over the time period
23 represented in the chart from 1950 to the year 2000?
24 A. Yes.
25 Q. And these are average tar and nicotine yields; is that

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Whidby-cross-Hefter

1 correct?
2 A. That is correct, yes.
3 Q. So, before you testified that Marlboro Reds have how many
4 milligrams of tar?
5 A. 15 to 16 milligrams.
6 Q. So we're clear here, the green line represents tar; is
7 that correct?
8 A. That is correct, yes.
9 Q. And the blue line represents nicotine?
10 A. Right.
11 Q. Those are average tar and average nicotine levels in
12 cigarettes sold in the United States?
13 A. They are something called sales weighted average, yes.
14 Q. And a pack of Marlboro Reds has around 15 or 16
15 milligrams of tar in it?
16 A. That's correct, yes.
17 Q. That's above the green line there as of today. Right now
18 the average sales weight of tar and nicotine cigarettes for
19 cigarettes sold in the United States is around 12 milligrams
20 of tar per cigarette; is that correct?
21 A. Approximately.
22 Q. Marlboro Reds is slightly above that; is that correct?
23 A. Correct.
24 Q. Now we have a package of Marlboro Lights.
25 MR. HEFTER: I will mark this as Whidby 2, your

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Whidby-cross-Hefter

1 Honor.
2 Q. How many milligrams of tar are in a typical package of
3 Marlboro Lights?
4 A. Ten or eleven.
5 Q. That's right around a little under the average; is that
6 correct?
7 A. Yes, a little bit.
8 Q. Then we have a package of Marlboro Ultra Lights; is that
9 correct?
10 MR. HEFTER: Procedural matter. I will mark this as
11 Whidby Exhibit 3.
12 Q. How much tar is represented in a Marlboro Ultra Light?
13 A. I don't recall exactly what the tar is.
14 Q. It is below Marlboro Lights; is that correct?

15 A. Yes, it is.
16 Q. Now, back in 1960 Philip Morris was selling Marlboros; is
17 that correct?
18 A. Yes.
19 Q. And they were selling Marlboro Reds Full Flavored
20 cigarettes in 1960?
21 A. I believe that's correct, yes.
22 Q. In 1960, if I look up and doing this roughly, would you
23 say there are approximately 22 milligrams of tar in a filtered
24 Marlboro Red cigarette?
25 A. I don't recall exactly what was in a Marlboro Red

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Whidby-cross-Hefter

1 cigarette in 1960, but that's not terribly off the mark.
2 Q. It is more than it is today; is that correct?
3 A. Yes.
4 Q. Now, has Philip Morris ever taken a Marlboro cigarette
5 that it sold in 1960 at 22 milligrams of tar and conducted any
6 biological test to determine whether it is safer than a
7 Marlboro Red currently sold on the market?
8 A. No, it has not.
9 Q. So, you don't know whether a Marlboro Red smoked today by
10 an American smoker is any safer or any less safer than a
11 cigarette sold by Philip Morris, Marlboro Red cigarette sold
12 in 1960, do you?
13 A. No, I don't know. I have a belief about that, though.
14 Q. Do you have any empirical data that it is any safer?
15 A. No, I don't.
16 Q. Let's take another hypothetical. Marlboro Reds compared
17 to Marlboro Lights. Your claim or your testimony is that a
18 cigarette with less tar is safer than a cigarette with more
19 tar; is that correct?
20 A. That's my belief.
21 Q. Has Philip Morris ever conducted a test to determine
22 whether in fact a Marlboro Light is any safer, any more safer
23 or less safer than a Marlboro Red?
24 A. No, we have not.
25 Q. So, you don't know other than your own personal belief

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1 that a Marlboro Light is any safer than a Marlboro Red?
2 A. No, I don't know.
3 Q. Now, I'm just noticing on this board that we put up here
4 that nicotine yields, average sales weighted nicotine yields
5 has not come down as fast as average sales weighted tar
6 levels; is that correct?
7 A. They come down just about as fast. The scale for the
8 nicotine is different than the scale for the tar, but the
9 ratio of nicotine to tar is slightly higher now than it was
10 with the non-filtered cigarettes earlier, slightly.
11 Q. The reason why the ratio has not come down as fast is
12 because Philip Morris knows that people need nicotine in their
13 cigarettes to smoke them; is that correct?
14 A. That's not correct. The reason the ratio hasn't changed
15 is because the acetate filter is slightly more efficient in
16 taking tar out than it is taking nicotine out.
17 Q. Now, when I was asking you questions about testing of the
18 Marlboro Reds from yesteryear and the Marlboro Reds from today
19 and, also, the testing of the Marlboro versus Marlboro Lights,

20 you testified that Philip Morris has not done -- conducted
21 tests to determine whether those comparisons make the lighter
22 cigarette safer; is that correct?
23 A. That's correct.
24 Q. And you included in your answer any tests that you know
25 of conducted at INBIFO; is that correct?

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Whidby-cross-Hefter

1 A. Yes, I did.
2 Q. You included in your answer any tests conducted at FTR?
3 A. That's correct.
4 Q. Can you tell the jury what FTR is?
5 A. FTR is a laboratory in Switzerland and Philip Morris has
6 a research facility there.
7 Q. In your answer you were intending to include CRC as well;
8 is that correct?
9 A. Yes. Yes, sir.
10 Q. Can you tell the jury what CRC is?
11 A. CRC is a laboratory in Belgium that does animal testing.
12 Q. And does it have any affiliation with Philip Morris?
13 A. Yes.
14 Q. What is the affiliation?
15 A. Philip Morris owns it.
16 Q. And you meant to include any testing that has been
17 contracted out by Philip Morris with outside laboratories as
18 well?
19 A. Yes, I did.
20 Q. Have I left any off?
21 A. Not that I know of.
22 Q. Now, you were recently involved in a project at Philip
23 Morris with the State of Massachusetts; is that correct?
24 A. That is correct, yes.
25 Q. Can you describe to the jury what the project that you

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1 were involved in in the State of Massachusetts was?
2 A. Actually, it is continuing project for Dr. Connolly in
3 Massachusetts.
4 Q. Let me stop you. Who is Dr. Connolly?
5 A. Dr. Connolly is the head of the Department of Public
6 Health in Massachusetts. I think that's his title. It may
7 not be exactly that. And what we've done with him, we, Philip
8 Morris and three of the tobacco companies, is to modify the
9 smoking regime to smoke a cigarette in what he says is more
10 intense smoking parameters. There are smoking parameters.
11 That was one of the projects. We do that on an annual basis.
12 Another project we did was smoking those cigarettes
13 at the elevated smoke parameters, more puffs and bigger puffs,
14 major number of toxic constituents in commercial cigarettes.
15 MR. HEFTER: PTX9902.
16 Q. Dr. Whidby, I will represent to you that this is a
17 Marlboro advertisement.
18 MR. HEFTER: Can we have the date of the document.
19 1965, your Honor. Upper right-hand corner.
20 Q. Do you see on the bottom in small letters --
21 MR. HEFTER: If you blow it up, if it is possible,
22 slightly to the left.
23 Q. -- it says twenty milligrams tar, one point three
24 milligrams nicotine average per cigarette, FTC report?

25 A. Yes, sir, I see it.

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1 Q. That's based on the FTC measurement parameters?

2 A. That's correct, yes.

3 Q. FTC puts out parameters by which it measures average tar
4 and nicotine yield in a cigarette; is that correct?

5 A. It is currently supervising a project.

6 Q. As of 1965 it was doing it; is that correct?

7 A. Yes.

8 Q. Currently the companies do that?

9 A. Companies pay for it, FTC has oversight over it.

10 MR. BLEAKLEY: Mr. Hefter, I believe the ad says
11 1970.

12 Q. As of 1970, Dr. Whidby, were the companies conducting the
13 testing or was the FTC conducting the testing, if you know?

14 A. I'm trying to recall. I don't recall when the FTC -- I
15 believe the companies were doing it in '70, but I'm not sure.

16 Q. Going back to the demonstrative that you had up on the
17 board.

18 A. Right.

19 Q. With the steep drop in average tar and nicotine yields,
20 that's based on the FTC measurement; is that correct?

21 A. That's correct.

22 Q. Let's talk for a second about what the FTC measurement
23 parameters are.

24 THE COURT: Put a number on that, please.

25 MR. HEFTER: Whidby 4, your Honor.

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Whidby-cross-Hefter

1 Q. Now, there's something called puff volume; is that
2 correct?

3 A. That's correct.

4 Q. Under FTC measurement parameter what is the puff volume?

5 A. 35 ccs.

6 Q. Can you explain to the jury what puff volume would be?

7 A. There's a machine, smoking machine. What it does is to
8 take a puff on the cigarette and that's 35 cubic centimeters
9 or 35 milliliters of air drawn from the cigarette.

10 Q. Is there something called a puff duration?

11 A. Yes.

12 Q. What's the puff duration under the FTC smoking
13 parameters?

14 A. Two seconds. So that 35 cc puff is pulled in in two
15 seconds.

16 Q. And is there something called puff interval?

17 A. Yes.

18 Q. What's the puff interval under the FTC smoking
19 parameters?

20 A. One minute.

21 Q. One minute?

22 A. There's one minute between puffs.

23 Q. So, the FTC smoking machine takes in 35 ccs of smoke for
24 two seconds and that's once every minute? Did I say that
25 correctly?

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Whidby-cross-Hefter

1 A. Not exactly. But it takes 35 ccs in the two second
2 period once a minute.
3 Q. Now, in the project that you were working on with the
4 State of Massachusetts, the State of Massachusetts proposed
5 that the FTC smoking parameters do not approximate human
6 smoking; is that correct?
7 A. Nobody -- I don't think anybody would believe that FTC
8 smoking parameters assimilates any individual smoking --
9 individual smoking parameters.
10 Q. That wasn't my question.
11 State of Massachusetts proposed that you change the
12 FTC smoking parameters because of that very fact, that human
13 smoking does not approximate FTC smoking parameters?
14 A. Right.
15 Q. Okay.
16 A. But nor does the Massachusetts for any individual either.
17 Q. We'll get there.
18 A. Okay.
19 Q. Now, under the Massachusetts proposal, what is the puff
20 volume?
21 A. 45 ccs.
22 Q. What's the puff duration?
23 A. Two seconds.
24 Q. And what's the puff interval?
25 A. Interval is thirty seconds, half a minute.

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Whidby-cross-Hefter

1 Q. Now, under the Massachusetts -- under the FTC regime, the
2 measurement parameters, are any of the ventilation holes
3 blocked?
4 A. No, they're not.
5 Q. Under the Massachusetts smoking parameters, are any of
6 the holes blocked?
7 A. Fifty percent of them are blocked.
8 Q. And the Massachusetts proposal is proposing 50 percent
9 blockage because it is possible smokers actually block the
10 holes when they smoke; is that correct?
11 A. It is possible smokers block the hole. Put it in their
12 mouth or whatever.
13 Q. That's all I'm asking, if it is possible.
14 Now, were you personally involved in running tests of
15 cigarettes under the Massachusetts --
16 A. Yes, I was.
17 Q. Those tests were conducted on products that were
18 commercially available in the state -- in the Commonwealth of
19 Massachusetts?
20 A. Yes. We actually purchased the cigarettes in the
21 Commonwealth of Massachusetts to run the test on.
22 Q. Were Marlboro Reds used in that test?
23 A. Yes, sir, it was.
24 Q. Marlboro Lights?
25 A. Yes, they were.

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1 Q. And isn't it true that if you use the Massachusetts
2 smoking parameters, measurement parameters, that the average
3 tar and nicotine yields for the cigarettes that were tested in
4 that product were increased by twofold?
5 A. For some cigarettes, yes.

6 Q. So, if you were to use the Massachusetts smoking
7 parameters, that machine would be getting for some of the
8 cigarettes twice as much tar and nicotine as the cigarette
9 smoke under the FTC parameters; is that correct?
10 A. Yes, it would.
11 MR. HEFTER: If we can have the chart again, demo
12 001852.
13 Q. If we use the same chart and the same scale and you were
14 to use the Massachusetts smoking parameters, the average tar
15 wouldn't be 12, it would be up here at 24; is that correct?
16 A. That's about right, yes, for today. Also be true that if
17 you smoke in the same way in the mid fifties, it wouldn't be
18 38 or whatever it would be, it would be double that, around
19 80.
20 Q. If you smoke it in the same way?
21 A. Yeah.
22 Q. Now, Philip Morris was aware back in the seventies, was
23 it not, that humans smoke cigarettes a lot different than the
24 way the FTC machine smokes it?
25 A. What we were aware of is each individual smokes a

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1 cigarette differently from individual to individual, various
2 times of the day to various other times of the day, yes.
3 MR. HEFTER: Can I have PTX0935.
4 Q. Dr. Whidby, have you ever seen this document before?
5 A. Yes, I have.
6 Q. Who is Leo Meyer?
7 A. I believe at the time Mr. Meyer -- I don't know what his
8 title was. He was in product development.
9 Q. He was a director at the time; is that correct?
10 A. I don't know. It is possible, yes.
11 Q. Who is Barbro Goodman?
12 A. Researcher at Philip Morris.
13 Q. Is she still a researcher at Philip Morris?
14 A. I believe she is.
15 Q. This document is dated September 17, 1975, correct?
16 A. Yes, that's what it says.
17 Q. When did you see this for the first time?
18 A. I don't recall.
19 Q. You weren't in Dr. Meyer's group at this time, were you?
20 A. Mr. Meyer. No, I was not.
21 Q. You were not in Mr. Meyer's group at the time?
22 A. No, I was not.
23 MR. HEFTER: Your Honor, I'm missing the last three
24 pages of the document which my questions would pertain to.
25 THE COURT: Well, if you can't find it we can break

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1 now.
2 MR. HEFTER: Actually, I did have it.
3 THE COURT: Okay.
4 Q. Now, this study, Dr. Whidby, compared the puff delivery
5 for Marlboro and Marlboro Lights; is that correct?
6 A. Would it be possible for me to see the document?
7 Q. Sure. I apologize.
8 A. It is hard to tell from reading on the screen.
9 Q. We're going to have to share.
10 A. All right. What was the question?

11 Q. Does this study compare the puff volume for Marlboro
12 versus Marlboro Light?
13 A. The document is a study attempting to do that using a
14 piece of equipment that I'm -- I was familiar with and using
15 the human smoking simulator. It was a very crude piece of
16 equipment that was pretty obtrusive when people smoked it. We
17 found out they didn't really smoke like they normally smoke
18 and the data here is mixed.
19 Q. That wasn't my question.
20 Does this document compare the puff volume for people
21 who smoke Marlboro and Marlboro Lights in that study?
22 A. Yes, it does.
23 Q. You've reviewed the document?
24 A. Yes.
25 Q. Can I take it back and ask you questions.

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Whidby-cross-Hefter

1 A. I may want to see it again though, please.
2 Q. That's fine. Thank you.
3 In the discussion section, the first sentence says:
4 The smoker profile data reported earlier indicated that
5 Marlboro Lights cigarettes were not smoked like regular
6 Marlboros. There were differences in the size and frequency
7 of the puffs, with larger volumes taken on Marlboro Lights by
8 both regular Marlboro smokers and Marlboro Lights smokers.
9 Did I read that correctly?
10 A. You did, yes.
11 Q. This study was on nine people; is that correct? I found
12 another copy.
13 A. Can you point me to where it says nine people, please?
14 Q. I thought it was here somewhere.
15 A. I'm not arguing with you. I just don't see it.
16 Q. Next sentence after the one I just read. There were a
17 total of nine smokers participating in the study spanning a
18 period of four weeks.
19 A. I see it. Sorry.
20 Q. The study dealt with nine people; is that correct?
21 A. That's correct.
22 Q. You wouldn't think that would be statistically
23 significant?
24 A. No.
25 Q. Did Philip Morris ever conduct any other studies like

M. BRYMER, RPR, OCR

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Whidby-cross-Hefter

1 this on a representative sample of smokers?
2 A. No, not like this.
3 Q. Now let's go to the conclusions. It is on the next page,
4 page two.
5 MR. HEFTER: I will put it on the Elmo.
6 Q. Conclusions: The smoker data collected in this study are
7 in agreement with results found in other project studies. The
8 panelists smoked the cigarettes according to physical
9 properties, i.e., the dilution and lower RTD -- what's RTD?
10 A. Resistance to draw.
11 Q. -- lower RTD. Marlboro Lights caused the smokers to take
12 larger puffs on that cigarette than on Marlboro 85s. What are
13 Marlboro 85s?
14 A. I assume they refer to Marlboro Red there.
15 Q. That's Marlboro Red?

16 A. That's what I assume, yeah.
17 Q. The larger puffs, in turn, increased the delivery of
18 Marlboro Lights proportionally. In effect, the Marlboro 85
19 smokers in this study did not achieve any reduction in smoke
20 intake by smoking a cigarette (Marlboro Lights) normally
21 considered lower in delivery. Conversely, the Marlboro Lights
22 smokers did not increase their smoke intake when they changed
23 to the regular delivery cigarette.
24 Did I read that correctly?
25 A. Yes, you did.

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Whidby-cross-Hefter

1 Q. This was distributed to Mr. Resnick; is that correct?
2 A. He's indicated on the list, yes.
3 Q. Mr. Resnick ultimately became the president of Philip
4 Morris; is that correct?
5 A. I believe he had the title at one time, yes. A
6 president.
7 MR. HEFTER: Your Honor, I will continue on the
8 subject matter. I don't know if you want to take a break at
9 this point.
10 THE COURT: We can break for lunch now. Be back at
11 five after two, please.
12 (The jury exits the courtroom.)
13 THE COURT: Thank you, Doctor.
14 (Lunch recess.)
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Whidby - Cross - Hefter

1 (Whereupon, the afternoon session began at 2:05 p.m.)
2 (Witness resumes the stand.)
3 (Jury in at 2:10 p.m.)
4 CROSS EXAMINATION
5 (Cont'd) BY MR. HEFTER:
6 Q. Thank you, your Honor.
7 Good afternoon, everybody.
8 Good afternoon, Dr. Whidby. Dr. Whidby, something
9 that I said in response to one of my questions intrigued me.
10 Based on the Massachusetts results, the average sales
11 weighted tar would go up to around 24, approximately, is that
12 correct?
13 A. That's correct, yes.
14 Q. You also said that back in the '50s or '60s that would
15 be increased as well?
16 A. Yes, because of the relative ranking of cigarettes did
17 not change in the Massachusetts parameter.
18 Q. You have no empirical evidence that that would be the
19 case because the Massachusetts study studied cigarettes sold
20 over the counter in the 1990s?
21 A. Yes. There was some prior to that, too.

22 Q. But not way back to the '50s and '60s?
23 A. We didn't bring it that far back to the '50s and '60s.
24 Q. If we can go back to the Goodman document. This is a
25 study that was conducted within Phillip Morris on Marlboro
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Whidby - Cross - Hefter

1 versus Marlboro lights, is that correct?
2 A. Yes.
3 Q. This isn't a biological study, is it?
4 A. No it's not.
5 Q. It's a study measuring tar and nicotine yields, correct?
6 A. Yes.
7 Q. And Phillip Morris also conducted consumer taste testing
8 within the R&D department, is that correct?
9 A. Yes, it is.
10 Q. In those tests, they used actual products that were sold
11 over the counter Marlboro Reds and Lights and some of your
12 competitors brands?
13 A. Yes.
14 Q. You talked earlier about ignition propensity?
15 A. Yes.
16 Q. In addition to that test you also conducted tests on
17 products that were sold over the counter, Marlboro Reds,
18 Marlboro Lights and some of your competitors' products?
19 A. Not normally, no.
20 Q. Those were just reference cigarettes that you were
21 testing?
22 A. Research cigarettes and reference cigarettes.
23 Q. Within Phillip Morris you also conducted chemical
24 composition tests, is that correct?
25 A. Yes.

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Whidby - Cross - Hefter

1 Q. And to do chemical composition tests, you were looking to
2 see whether 1 cigarette had more nitrosamines than another
3 cigarette?
4 A. That would be one of the reasons, yes.
5 Q. One those tests you were using, were you not, cigarettes
6 sold over the counter?
7 A. Not normally, no.
8 Q. Those were reference and research cigarettes?
9 A. Generally, yes.
10 Q. As well.
11 If we could turn to PTX 0849, please.
12 THE COURT: Is 935 in?
13 MR. HEFTER: We move for it's admission.
14 THE COURT: Admitted.
15 (Marked as PTX 935 in evidence.)
16 THE COURT: And this is?
17 MR. HEFTER: PTX 0849.
18 I think these documents have previously been admitted
19 into evidence.
20 THE COURT: Then I'll rely on you. I just don't
21 want documents left hanging.
22 Q. Dr. Whidby, do you recognize this document?
23 A. No, I don't.
24 Q. Did you see it at the time that you were employed by
25 Phillip Morris in 1974? And let me give you a full copy.

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Whidby - Cross - Hefter

1 A. No, I did not.
2 Q. Would you turn to paragraph 1.
3 MR. BLEAKLEY: Objection, no foundation for this
4 document. He has never seen it. It's not addressed to him,
5 from him, it's not copied to him.
6 THE COURT: Is it in evidence?
7 MR. HEFTER: It's already in evidence.
8 MR. BLEAKLEY: There is still no foundation for this
9 witness' knowledge.
10 THE COURT: He can be questioned about it on
11 credibility issues.
12 You may proceed.
13 Q. If we can get the first paragraph.
14 Paragraph 1:
15 Some concern has been expressed concerning the moral
16 obligation of Phillip Morris and perhaps the tobacco industry
17 to reveal to the FTC the fact that some cigarette smokers may
18 be getting more tar than the FTC rating of that cigarette.
19 You mentioned in your presentation at the center on Tuesday,
20 March 5, that such concern was voiced in New York -- and why
21 -- at your talk there and it was expressed again by some
22 individuals who heard you in Richmond.
23 At the time that you were employed by Phillip Morris
24 in 1974 Dr. Whidby, were you aware that there were researchers
25 within Phillip Morris who expressed concern that some
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Whidby - Cross - Hefter

1 cigarette smokers may be getting more tar than the FTC rating
2 on the cigarettes.
3 A. The time I was at Phillip Morris I was aware that the FTC
4 smoking parameters did not represent what an individual got,
5 some people got more, some people got less and perhaps even on
6 rare occasions some people might get the same amount as the
7 FTC.
8 Q. In 1974?
9 A. Was I aware? Yes.
10 Q. Were you aware that there were some people within Phillip
11 Morris who expressed the concern that some cigarette smokers
12 may be getting more tar than the FTC rating of that cigarette?
13 A. As I said before, with the submission to the FTC, Phillip
14 Morris told the FTC, and I knew way back in 1974 that the FTC
15 smoking parameters does not represent any one's individual
16 smoking parameters and what the individual smoker gets, it may
17 be more, may be less than the FTC numbers.
18 Q. Let me ask it a different way. In 1974, were you aware
19 that Dr. Fagen had expressed this concern to Dr. Wakeham?
20 A. No, I was not.
21 Q. PTX 9729.
22 MR. HEFTER: May I approach, your Honor?
23 THE COURT: Yes.
24 Q. While you are reading that, doctor, my first question to
25 you is going to be: Have you ever seen this document before?
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Whidby - Cross - Hefter

1 A. Not before preparation for this case.
2 Q. So your lawyers have shown you this document in

3 preparation for your testimony?
4 MR. BLEAKLEY: Objection, it's not relevant whether
5 a lawyer showed him this document. Any questions that we did
6 in preparation is privileged. He knows it. Whether we showed
7 him that document is not evidence and I object to the use of
8 this document on the same grounds as I did before, no
9 foundation, this witness did not see this document when he was
10 employed by Phillip Morris, no foundation for asking the
11 question about it.
12 THE COURT: Are you representing this witness?
13 MR. BLEAKLEY: The privilege -- yes, I am
14 representing this witness.
15 THE COURT: You are representing this witness as
16 well as the company?
17 MR. BLEAKLEY: In this proceeding, no, I'm not
18 representing the witness.
19 THE COURT: Then whatever you show him is not
20 privileged.
21 MR. BLEAKLEY: All right, I'm not going to argue
22 with you about it.
23 THE COURT: You needn't argue. I'm trying to
24 understand the nature of the objection.
25 MR. BLEAKLEY: I don't want to get into a discussion
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Whidby - Cross - Hefter

1 of whether or not the conversations that we had with Dr.
2 Whidby in preparing for his testimony here are or are not
3 privileged.
4 My main objection is: Is there is no foundation for
5 asking this witness about a document that he never saw at any
6 time while he was employed by Phillip Morris.
7 THE COURT: As I said, and I overrule you again, he
8 can be asked about it for credibility purposes. The document
9 is already in evidence and he is being asked about it and it's
10 clear he can say that he didn't see it while he was employed.
11 But he is being asked, I take it, to show if there is any such
12 basis, that there may be an inconsistency between what he now
13 says and what was being said almost contemporaneously.
14 It's appropriate and it's also appropriate to ask him
15 whether he saw it immediately before in preparation so that he
16 knows that he is -- and he is not surprised by it.
17 So I don't understand these objections, again, and
18 I'm sure it's my fault but I overrule you again reluctantly.
19 Q. Prior to the time you started working --
20 THE COURT: Excuse me.
21 The jury should ignore this by play between attorneys
22 and the Court. The attorneys are doing exactly what they
23 should do. We have very fine attorneys here and the only
24 reason I'm not having this at the sidebar is I don't want to
25 slow things up but you should ignore this. It has nothing to
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Whidby - Cross - Hefter

1 do with you, except as you may be amused observing it.
2 Go ahead, please.
3 Q. Prior to the time that you started testifying in tobacco
4 and smoking litigation, have you ever seen this document
5 before?
6 A. No, I have not.
7 Q. And the document is entitled: Some Unexpected

8 Observations On Tar and Nicotine and Smoker Behavior, dated
9 March 1, 1974.
10 Do you know if this document was produced out of the
11 files of Phillip Morris?
12 THE COURT: Don't answer.
13 Q. Were you involved at all, Dr. Whidby, in reviewing
14 documents for production in litigation during your career at
15 Phillip Morris?
16 A. Yes, I was.
17 Q. Are you aware of the different types of Bates numbers
18 that the company used?
19 A. I'm aware that we used Bates numbers.
20 Q. Is this the type of Bates number that you recognize being
21 on a Phillip Morris document?
22 A. I can't say for certainty that it is.
23 Q. I'll move on.
24 We turn to the summary.
25 It might just be easier for me to put it on the Elmo.
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Whidby - Cross - Hefter

1 Dr. Whidby, during the time you were at Phillip
2 Morris, were you aware researchers in 1974 had concluded that
3 people do not smoke like a machine?
4 A. I was aware that people didn't smoke like the machine,
5 yes.
6 Q. Were you aware at the time that people smoked cigarettes
7 differently?
8 A. Yes.
9 Q. And were you aware at the time that researchers at
10 Phillip Morris had concluded in 1974 that people vary greatly
11 with respect to smoke intake into the mouth?
12 A. Yes.
13 Q. And were you aware at the time in 1974 that researchers
14 at Phillip Morris had concluded that the number of cigarettes
15 smoked is very unreliable measure of intake?
16 A. I think so, I'm not really sure but probably.
17 Q. And --
18 A. But I really don't know, I don't know exactly what is
19 meant by that statement.
20 Q. Were you aware in 1974 at the time of this document that
21 researchers at Phillip Morris had concluded that generally
22 people smoke in such a way that they get much more than
23 predicted by machine; this is especially true for dilution
24 cigarettes?
25 A. What I was aware of was that people didn't smoke like the
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Whidby - Cross - Hefter

1 machine. They could get more or less.
2 Q. Were you aware that researchers at Phillip Morris had
3 stated in this document that generally speaking smokers smoke
4 in such a way that they get much more than predicted by
5 machine and this is especially true for dilution cigarettes?
6 A. I don't recall.
7 MR. BLEAKLEY: I will object.
8 THE COURT: That is objectionable. He said he
9 didn't see the document.
10 Sustained.
11 Q. Dr. Whidby, in 1974, were you aware that researchers at
12 Phillip Morris had concluded that measured RTD on unlit

13 cigarettes is far from what the smoker experiences as he
14 puffs?
15 A. We did -- I was aware of the fact that the RTD
16 measurement, if you make an RTD measurement on cigarettes,
17 it's the wrong measurement. You need to make it on a lit
18 cigarette.
19 Q. Were you aware in 1974 that researchers at Phillip Morris
20 had concluded that composition of smoke varies with smoking
21 conditions?
22 A. No.
23 Q. Was the fact that people smoked cigarettes differently
24 ever communicated to the American public by Phillip Morris?
25 A. We communicated to the Federal Trade Commission our
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Whidby - Cross - Hefter

1 concern about the smoking machine not representing what an
2 individual smoker would get.
3 Q. Did you ever communicate that to the American public not
4 the FTC, the American public?
5 A. I don't know, I don't know whether Phillip Morris did or
6 didn't.
7 Q. We can go to Demo 000479, please.
8 You talked about general reduction and selective
9 reduction earlier, correct?
10 A. Correct.
11 Q. Do you have any empirical evidence that the general
12 reduction techniques and selective reduction techniques had in
13 fact made Phillip Morris' product safer?
14 A. No, I do not. I do have a view on that.
15 Q. But you have no empirical data that that is the case?
16 A. No.
17 Q. Let me turn to the next demo.
18 Your graph is based on a citation to an article by a
19 Dr. Hoffmann. Do you see that?
20 A. Yes, sir.
21 Q. And Dr. Hoffmann is Dietrich Hoffmann?
22 A. Yes, sir, that's correct.
23 Q. Can I have 2350.
24 This is an article in the Journal of Preventive
25 Medicine. Do you see that?
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Whidby - Cross - Hefter

1 A. Yes.
2 Q. And the author is Dietrich Hoffmann and Djordjevic
3 Mirjana Djordjevic and Ilse Hoffmann. Do you see that?
4 A. Yes.
5 Q. Have you ever seen this before?
6 A. I believe so. Could I see it, please?
7 Q. Absolutely.
8 THE COURT: This is 1997.
9 MR. HEFTER: 1997 in a publication called Preventive
10 Medicine.
11 (Pause.)
12 Q. Have you ever seen this document before?
13 A. I believe I have, yes.
14 Q. Turn to page 2 or page 428 of the article in the upper
15 right-hand corner?
16 That is the exact same chart that you put on your
17 demonstrative, is that correct?

18 A. Yes, sir, I believe so.
19 Q. And isn't it a fact that in this article Dr. Hoffmann and
20 his coauthors conclude that while average sales weighted tar
21 and nicotine levels have decreased, there has not been a
22 decrease in lung cancer rates in this country?
23 MR. BLEAKLEY: Objection, your Honor. An article
24 like this should be read verbatim, not paraphrased.
25 THE COURT: He is here as a fact witness, not an
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Whidby - Cross - Hefter

1 expert.
2 MR. HEFTER: I'll rephrase the question.
3 Q. Let me turn to page 431.
4 If we could blow up the right-hand column on the
5 text.
6 Let me read from it, Dr. Whidby.
7 On the basis of our laboratory studies we hypothesize
8 that the smokers of cigarettes with low nicotine delivery
9 inhale smoke more intentionally and more deeply to satisfy an
10 acquired need for a certain dose of nicotine.
11 It goes over to the next page.
12 Consequently, the peripheral lung is exposed to
13 relatively high amounts of lung carcinogens such as TSNA,
14 specifically NNK.
15 Were you aware, Dr. Whidby, in or around 1997 that
16 Dr. Hoffmann and his coauthors concluded that smokers of low
17 nicotine delivery cigarettes inhale smoke more intensely.
18 MR. BLEAKLEY: Objection. This witness is here as a
19 fact witness. This is a complicated scientific study.
20 Whether he was aware of it or not is beyond the scope of
21 direct examination it's beyond the scope of the purpose for
22 which he is here to testify.
23 THE COURT: You can only ask him whether the table
24 that he relied upon in direct is thrown into some doubt or
25 qualified in some way by the paper from which he says he
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Whidby - Cross - Hefter

1 copied the table. But that is as far as his testimony on
2 direct went, I think.
3 MR. HEFTER: If I can just address that for a
4 second. He is testifying that cigarettes became safer because
5 of general reduction.
6 THE COURT: No, he wasn't testifying to that. He
7 said he didn't know whether they were safer, as I recall. The
8 jury will recall it.
9 MR. HEFTER: His first demonstrative is Working To
10 Make Cigarettes Safer and he points to various ways that they
11 have tried to make cigarettes safer. This paper shows that in
12 fact that may not be true.
13 MR. BLEAKLEY: No, it doesn't show that he didn't
14 try to make them safer.
15 THE COURT: It seems to me it's a subtle point but
16 one which our very sophisticated jury will pick up.
17 Q. Dr. Whidby, do you have any evidence that the general
18 reduction technology that Phillip Morris employed or the
19 selective reduction technology that Phillip Morris employed
20 has led to one fewer case of lung cancer in this country?
21 A. I don't have any data.
22 Q. Do you know whether it is had led to one less cancer

23 related death in this country?
24 A. I don't know but I have a view on that.
25 Q. Do you have any empirical data that that is the case?
ALLAN R. SHERMAN, C.S.R., RPR, Official Court Reporter

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Whidby - Cross - Hefter

1 A. No, I don't.
2 Q. You talked earlier about charcoal filters, is that
3 correct?
4 A. Yes.
5 Q. And charcoal filters remove certain bad things in
6 cigarettes?
7 A. Yes.
8 Q. What types of things?
9 A. They remove aldehydes and some other organic compounds.
10 Q. And aldehydes are a bad thing?
11 A. That's what the Public Health Department and
12 toxicologists at Phillip Morris say.
13 Q. And the toxicologists at Phillip Morris concluded that a
14 long time ago?
15 A. I believe yes.
16 Q. You mentioned Parliament?
17 A. Yes.
18 Q. This is a package of Parliaments?
19 A. Yes.
20 Q. Does this package of Parliaments contain a charcoal
21 filter?
22 A. I said one package of Parliaments did, Parliament Light
23 100s do.
24 Q. They do?
25 So this package Parliament Lights contains charcoal?
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Whidby - Cross - Hefter

1 A. I didn't say that. Parliament Light 100s did.
2 Q. These are not the Parliament Light 100s?
3 A. No.
4 Q. So not all Parliaments contain charcoal?
5 A. No.
6 Q. Even though a charcoal filter reduces aldehydes, all the
7 packages do not contain the charcoal filter?
8 A. No.
9 Q. And Marlboro Reds do not contain a charcoal filter?
10 A. No, they do not.
11 Q. So a person who smokes a Marlboro Red is getting
12 proportionately more aldehydes than a person who smokes a
13 Parliament Light 100 which had a charcoal filter, is that
14 correct?
15 A. Yes, proportionately, I believe that to be the case.
16 Q. And Marlboro Lights, they don't contain a charcoal
17 either?
18 A. No.
19 Q. And Marlboro Reds and Marlboro Lights is Phillip Morris'
20 best seller, is that correct or sellers?
21 A. Yes.
22 Q. You talked about the denitrification project, didn't you?
23 A. Yes.
24 Q. And you testified earlier that you did not work on any
25 denitrification project prior to 1981, is that correct?
ALLAN R. SHERMAN, C.S.R., RPR, Official Court Reporter

Whidby - Cross - Hefter

- 1 A. That's correct.
 2 Q. But isn't it a fact, Dr. Whidby, that there was a
 3 denitrification project prior to 1981?
 4 A. That's correct.
 5 Q. And you didn't work on that project?
 6 A. No, I did not.
 7 Q. And you are aware, are you not, Dr. Whidby, that the
 8 prior denitrification project was never implemented by Phillip
 9 Morris, is that correct, first generation denitrification
 10 project was not?
 11 A. No, it didn't work either.
 12 Q. But it was not implemented, is that correct?
 13 A. No, it wasn't implemented but it didn't work.
 14 Q. Are you aware that an economist at Phillip Morris
 15 concluded that project was cost effective, is that correct?
 16 A. I don't understand how it could be cost effective if it
 17 didn't work.
 18 Q. That wasn't my question. My question was were you aware
 19 that an economist at Phillip Morris concluded that first
 20 generation denitrification project was cost effective?
 21 A. I've heard of that.
 22 Q. Now, you also testified earlier about the Cambridge
 23 cigarette, is that correct?
 24 A. Yes.
 25 Q. And the Cambridge cigarette is no longer on the market?
- ALLAN R. SHERMAN, C.S.R., RPR, Official Court Reporter

Whidby - Cross - Hefter

- 1 A. Cambridge is on the market.
 2 Q. The Cambridge, the 3 packages of Cambridge, 5 milligrams
 3 tar, 1 milligram tar, and .1 milligram of tar are no longer on
 4 the market?
 5 A. That's correct.
 6 Q. If I can have PTX 9785.
 7 MR. HEFTER: Can I approach, your Honor?
 8 THE COURT: Yes.
 9 You don't have to ask.
 10 Q. If you can flip through that document, Dr. Whidby, and
 11 tell me if you have ever seen this document before?
 12 A. I don't recall seeing this document before.
 13 Q. If you turn to the --
 14 THE COURT: What date is the document?
 15 MR. HEFTER: It's approximately 1986, your Honor.
 16 Q. If you turn to Bates number 2043793131.
 17 Do you know who L. Glennie is?
 18 A. No, sir.
 19 Q. Do you see where I am?
 20 A. Yes, I'm just looking through the rest of the document.
 21 Q. I didn't hear your answer. Do you know who L. Glennie
 22 is?
 23 A. No, I do not.
 24 Q. It's a memorandum to the entire sales force.
 25 Were you ever a member of the sales force at Phillip
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Whidby - Cross - Hefter

- 1 Morris?
 2 A. No, I was not.
 3 Q. Can you turn to the second paragraph, please.

4 It says: The Cambridge name will give us an
5 opportunity to build upon established familiarity and create a
6 new image for Cambridge through advertising and promotional
7 activities. The new Cambridge packaging is designed to be
8 competitive within the value category. The red and green
9 gradation lines on the package will reinforce the improved
10 flavor at the new tar level.

11 Were you aware when you were at Phillip Morris in the
12 mid-1980s that there was a memo sent to the entire sales
13 force saying that Cambridge name will give us an opportunity
14 to build upon established familiarity and create a new
15 Cambridge image?

16 A. No.

17 Q. You also testified about a project called Score, is that
18 correct?

19 A. That's correct.

20 Q. What is Score?

21 A. It's a project going on within Phillip Morris right now
22 to attempt to reduce the harmful constituents in a
23 conventional cigarette.

24 Q. How is it attempting to do that?

25 A. Many of the technologies are being applied to the project
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Whidby - Cross - Hefter

1 are of a proprietary nature.

2 Q. Let me ask you this question. What chemical compounds is
3 it seeking to remove from the cigarette?

4 A. If I talked about those, then our competitors might be
5 able to figure that out, probably would be to some extent.

6 Q. Let me ask you this question to cut this right to the
7 chase: Are any of the technologies that you are exploring in
8 the Score project implemented in any cigarette pack of
9 Marlboro Reds in the United States at this time?

10 A. To one degree or another, yes.

11 Q. Have you conducted any biological test on a Marlboro Reds
12 or Lights to determine whether any of the technologies
13 implemented through the Score project make the product safer?

14 A. No.

15 Q. So you don't know one way or another whether the Score
16 project technologies implemented there will make your Marlboro
17 -- will make a Marlboro Red safe?

18 A. No, I do not.

19 Q. You talked about the Next.

20 Now it's true that you previously testified that you
21 didn't think that the Next cigarette tasted too bad?

22 A. The first cigarette or 2 you smoked didn't taste too bad
23 but the third and fourth one did taste bad.

24 Q. And that is based on --

25 A. And after the while I was working on the project so I was
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Whidby - Cross - Hefter

1 evaluating the taste of the cigarettes. It had an off taste
2 that I could pick up in the first cigarette, first puff, every
3 time.

4 Q. And that is your personal view?

5 A. Yes.

6 Q. You put up on the board a picture of a plant.

7 Do you have that plant, the Virginia plant?

8 You said that one of the buildings was 3 football

9 fields long?
10 A. Yes.
11 Q. This was in production in the late 1980s, that Next
12 cigarette?
13 A. Yes, sir.
14 Q. So from the late 1980s until the present that big
15 building there is just dormant, Phillip Morris is not going
16 anything in there?
17 A. No.
18 Q. Nothing is going on in there?
19 A. No.
20 Q. No one is playing football in there?
21 A. It has too much stuff to play football.
22 Q. What stuff?
23 A. The extraction equipment.
24 Q. But nothing else is going on?
25 A. Big stainless steel high pressure extraction units,
ALLAN R. SHERMAN, C.S.R., RPR, Official Court Reporter

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Whidby - Cross - Hefter

1 nothing going on.
2 Q. Doesn't make regular cigarettes?
3 A. No.
4 Q. Marlboro Reds?
5 A. No.
6 Q. Marlboro Lights?
7 A. No.
8 Q. All those other buildings there not being used?
9 A. The ones in the highlighted area are not, the others
10 are.
11 Q. So all these drums and everything are not being used?
12 A. That is part of the containers for CO2.
13 Q. No CO2 in there?
14 A. I don't think there is any there now.
15 Q. The Next product wasn't a very successful product, was
16 it?
17 A. Unfortunately, no.
18 Q. You say that people didn't like the taste, is that
19 correct?
20 A. That's correct.
21 Q. Is it your testimony the fact that there was no nicotine
22 in there didn't make any difference as to whether the product
23 was a success?
24 A. We added nicotine back do it the same level before we
25 took it out and it still tasted bad is what I said.
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Whidby - Cross - Hefter

1 Q. Where did you put the nicotine?
2 A. Back in the tobacco.
3 Q. Back in the tobacco. Did you ever try spraying it on the
4 filter tip?
5 A. No.
6 Q. The Next cigarette was test marketed?
7 A. Yes.
8 Q. Test marketed in Tampa?
9 A. One of the cities.
10 Q. Spokane?
11 A. I think that is right.
12 Q. Where else?
13 A. I don't recall.

14 Q. A few more cities, right?
15 A. A few more cities. I don't recall the locations.
16 Q. During the time period, do you know if R.J. Renyolds
17 flooded the market with Camel cigarettes?
18 A. I don't know whether they did or not.
19 Q. That would affect a test market, wouldn't it, if a
20 competitor came in and flooded the market with a different
21 product?
22 THE COURT: If you don't know about marketing, don't
23 say anything about it.
24 Q. Do you know?
25 A. No.

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Whidby - Cross - Hefter

1 Q. You weren't part marketing team for this product?
2 A. No.
3 Q. Do you know how Next advertisement compared to the
4 Marlboro Man?
5 THE COURT: If you don't know anything about it --
6 he is not here as a marketing person.
7 Let's move ahead.
8 Q. You also testified about the Accord?
9 A. I did.
10 Q. Has Phillip Morris ever conducted any tests on the Accord
11 to determine whether it has less buying activity than a
12 Marlboro Red?
13 A. No.
14 Q. So you don't know whether the Accord is safer than a
15 Marlboro Red?
16 A. No.
17 Q. You don't know whether Accord is safer than a Marlboro
18 Light?
19 A. No, but I certainly have a view.
20 Q. You have no empirical data that it is?
21 A. No.
22 Q. Let me have the chart that Demo 000087.
23 When you put this up here, this is a comparison of
24 the smoke constituents in Accord versus a reference cigarette?
25 A. That's correct.

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Whidby - Cross - Hefter

1 Q. It's not compared to a Marlboro Red?
2 A. No, it's not.
3 Q. Where are these tests conducted?
4 A. Those tests were conducted in IMBIFO.
5 Q. Is the source for this demo the Accords that we talked
6 about with Mr. Bleakley?
7 A. The data that went into this came from that same test.
8 Q. On those charts, the jury has seen them a lot in the last
9 2 days, one of the charts refers to research cigarette, is
10 that correct?
11 A. Yes.
12 Q. Rather than have you guess about it --
13 Dr. Whidby, is this one of the studies? And for the
14 record, it's called Discrimination Cigarette Mainstream Smoke
15 Condensates With The Salmonella Reverses Mutation Assay, is
16 this one of the studies which is a source for that demo?
17 A. This data was collected at the same time, yes.
18 Q. On this chart, TA 98, the chart I'm referring to

19 specifically, there are a whole bunch of numbers down here.
20 Those are the reference -- I mean the research cigarettes?
21 A. Yes, I believe so. How many --
22 Q. If you'd like to come down and take a closer look at it.
23 A. There is 50 research cigarettes and 50 American blended
24 research cigarettes.
25 Q. You are not the author on that document?
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Whidby - Cross - Hefter

1 A. No, sir.
2 Q. And you are not the author on any of the other studies
3 from IMBIFO?
4 A. No, I'm not.
5 Q. And isn't a fact that during experiments, that it would
6 be typically, cigarettes would be, their filter would be
7 over-wrapped to hide the name of the cigarette?
8 A. These cigarettes didn't have any names on them.
9 Q. So none of these are whole products?
10 A. No, none. None of these are commercial cigarettes.
11 Q. Now, just focusing on that chart TA 98, the stars mean
12 that there is a statistical significance between that
13 cigarette and the prototype, is that correct?
14 A. That's correct.
15 Q. And this chart is a study on the tar levels in those
16 cigarettes for a specific mutagenicity on an equal tar basis?
17 A. I believe that's what it was for, yes.
18 Q. So explain to the jury what equal tar basis means?
19 A. An equal tar basis, what you would do would be to
20 normalize a test for tar. So in this case it was normalized
21 to the 1R4F cigarette to make sure everything is on equal tar
22 basis.
23 If a cigarette is giving 2 milligrams of tar, another
24 is giving 4 milligrams of tar, you would equalize the tar from
25 the two cigarettes so both of the tests would have 2
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Whidby - Cross - Hefter

1 milligrams of tar, you have all the tar from one, half the tar
2 from another.
3 Q. This doesn't take into account human smoking conditions?
4 A. No, it does not. It uses FTC smoking conditions and I
5 don't know what human smoking conditions are.
6 Q. It smokes it through a machine not by bringing the people
7 in to test?
8 A. We don't do the testing that way.
9 Q. Prior to 1981, you have no recollection as to what was
10 happening at IMBIFO, do you?
11 A. Yes, I do.
12 Q. You have no recollection of any of the test data that was
13 coming out of IMBIFO, do you?
14 A. Specifically, I can't recall right now but I did, I
15 didn't know people from IMBIFO, I knew some of the research
16 they were doing, heard presentations from them.
17 Q. But you previously testified that you have no
18 recollection prior to 1981 of any of the specific test results
19 coming out of IMBIFO?
20 A. I believe that's right.
21 Q. And from 1978 until approximately 1984 you were in the
22 applied research group, right?
23 A. Yes.

24 Q. You weren't in Dr. Odene's group during that time period?
25 A. No, sir, I was not.
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Whidby - Cross - Hefter

1 Q. During that time period, did you ever have occasion to
2 visit IMBIFO?
3 A. What was the time period again?
4 Q. Let's say 1972 to 1984.
5 A. No, I did not.
6 Q. And would it also be true that during that time period
7 you never visited Dr. Odene's house?
8 A. That's not true.
9 Q. You were at Dr. Odene's house during that period?
10 A. Yes.
11 Q. Now Dr. Whidby, you testified that you have never heard
12 about documents from IMBIFO being destroyed, is that correct?
13 A. That's correct.
14 Q. But you don't know for a fact whether documents from
15 IMBIFO were or were not destroyed, is that correct, during
16 that time period?
17 A. No, I don't. The only thing I know is nobody around me
18 ever destroyed documents.
19 Q. But you don't know if other people destroyed documents?
20 A. I can't know what everybody did.
21 Q. You testified about -- you testified before during
22 direct, Mr. Bleakley's questions about a speech made by
23 William Dunn at Williamsburg back in 1972, is that correct?
24 A. Yes.
25 Q. That was approximately 2 or 3 months after you arrived at
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Whidby - Cross - Hefter

1 the company?
2 A. That's correct.
3 Q. And you were invited to go to a CORESTA conference 2 or 3
4 months into your tenure at Phillip Morris?
5 A. Yes, I was.
6 Q. I have PTX 2355. This is already in evidence,
7 your Honor.
8 MR. HEFTER: Your Honor, I'm told that we don't have
9 the document at this point in time. I only probably have
10 around 10 more minutes of questioning of Dr. Whidby. Maybe if
11 we can take a break now.
12 THE COURT: Sure, if you'd like to, go ahead.
13 (Jury out at 3 p.m.)
14 (Continued on next page.)
15 (Recess.)
16 (Jury in at 3:10 p.m.)
17 CROSS EXAMINATION
18 (Cont'd) BY MR. HEFTER:
19 MR. HEFTER: I apologize for that, your Honor. Let
20 me start over on that subject.
21 Q. You testified earlier in response to Mr. Bleakley's
22 questions about a speech made by William Dunn at Williamsburg
23 in October 1972?
24 A. Yes.
25 Q. That was the conference that you had attended?
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1 A. Yes.
2 Q. Is Dr. Dunn still alive today?
3 A. I think he is, yes.
4 Q. Let me show you a document which has been admitted PTX
5 2355.
6 You can flip through that if you would.
7 (Continued on next page.)
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1 CROSS-EXAMINATION (Cont.'d)
2 BY MR. HEFTER:
3 A. Okay.
4 Q. Do you know when this speech was given?
5 A. Not exactly, no.
6 Q. Let me turn you --
7 A. It looks very, very similar to what was said at
8 Williamsburg.
9 Q. You don't know when this speech was given?
10 A. No, not exactly.
11 Q. Let me turn you to the last page of the document. It is
12 Bates number 2024273975, and the last paragraph reads: This
13 is the end of my presentation. If you have been intrigued by
14 any of these ideas, I recommend the recently published volume
15 entitled "Smoking Behavior: Motives and incentives,"
16 compendium of papers presented at the St. Martin conference,
17 published by V.H. Winston and Sons, Washington D.C.
18 Do you see that?
19 A. Yes.
20 Q. Do you know when that was published, "Smoking Behavior
21 Motives and Incentives" was published?
22 A. No, I don't.
23 Q. Let me show you BCD11015. This is a portion of a book
24 entitled "Smoking Behavior, Motives and Incentives" by William
25 L. Dunne. Have you seen that book, Dr. Whidby?

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1 A. I believe I have.
2 Q. Let me show you not the cover, but the first page on the
3 inside cover. Do you see where it says "V.H. Winston and
4 Sons, Washington D.C."?

5 A. Yes.
6 Q. To the left it says 1973?
7 A. Yes.
8 Q. Does that indicate to you this book was published in
9 1973?
10 A. Yes, it would. I believe it would.
11 Q. If you turn back to PTX2355, Dr. Dunne states: I
12 recommend the recently published volume entitled "Smoking
13 Behavior Motives and Incentives," compendium of papers
14 presented at the St. Martin conference published by V.H.
15 Winston and Sons.
16 Do you see that?
17 A. Yes.
18 Q. Does that indicate to you the speech was given after the
19 date this book was published in 1973?
20 MR. BLEAKLEY: Objection, your Honor. How would he
21 know?
22 THE COURT: You needn't ask the witness that.
23 Q. Does this indicate to you, Dr. Whidby, this is not the
24 same speech that was reported in the Newport News Press on
25 October 29th, 1972, BCD31314?

M. BRYMER, RPR, OCR

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Whidby-cross-Hefter

1 MR. BLEAKLEY: Same objection.
2 THE COURT: Well, you can make that statement. Okay.
3 Q. Let me just show --
4 THE COURT: No, you don't need the witness for that.
5 They will accept your statement.
6 Q. Dr. Whidby, earlier today -- I will ask you a few more
7 questions about that document.
8 Earlier today I believe you said that you believed
9 that smoking causes -- that you believed that smoking caused
10 lung cancer at the time that you started working at Philip
11 Morris in 1972; is that correct?
12 A. That is correct, yes.
13 Q. Now, isn't it a fact, Dr. Whidby, that on November 19th,
14 1999, in a prior tobacco and health case, that you stated you
15 didn't know whether smoking caused lung cancer?
16 A. If I did I was answering I don't know what in cigarette
17 smoke causes lung cancer. I still don't know what in
18 cigarette smoke causes lung cancer, but I do believe cigarette
19 smoking causes lung cancer.
20 Q. Okay. Let me read to you from your testimony of November
21 19th, 1999.
22 THE COURT: Page.
23 MR. HEFTER: Page 56.
24 MR. BLEAKLEY: Are you going to show it to him?
25 MR. HEFTER: (Handing to witness.)

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Whidby-cross-Hefter

1 Q. Is that your testimony, Dr. Whidby, on November 19th,
2 1999?
3 A. Yes, it is.
4 Q. "Question: Okay. When you began working at Philip
5 Morris, did you believe that cigarette smoking would cause
6 lung cancer?
7 "Answer: No, I don't think I believed it did. I
8 just didn't know.
9 "Question: Do you believe it does today?

10 "Answer: I don't know.
11 "Question: You don't have any opinion as to whether
12 or not cigarette smoking causes lung cancer?
13 "Answer: Again, I'm not -- that's not my area of
14 expertise.
15 "Question: I'm not asking you" --
16 You respond: "My personal opinion, I don't know."
17 Is that your testimony on November 19th, 1999?
18 A. Yes, it is. It is consistent with what I'm saying now.
19 Q. Now, are you aware that in October of 1999 Philip Morris
20 put out a web site and stated its position on causation?
21 A. I'm aware they have a web site. I don't know the exact
22 statement put out.
23 MR. HEFTER: Can we have the October 1999 web site.
24 PTX8801. I believe it is already in evidence, your Honor.
25 Q. Now, in October of 1999, approximately one month or so
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Whidby-cross-Hefter

1 prior to your testimony in the previous case which you
2 testified, it states on the Philip Morris web site: There is
3 an overwhelming medical and scientific consensus that
4 cigarette smoking causes lung cancer, heart disease, emphysema
5 and other serious diseases in smokers.
6 Do you see that?
7 A. Yes, I do.
8 Q. Now, are you aware that sometime in June of the year 2000
9 that Philip Morris changed its position on causation and
10 issued a new statement on its web site?
11 A. I'm aware that the web site has made changes.
12 MR. HEFTER: Can we have the web site from the year
13 2000, PTX9689. Your Honor, I believe this is also in
14 evidence.
15 Q. Philip Morris changed its position --
16 MR. BLEAKLEY: Objection, your Honor. That document
17 does not say Philip Morris changed its position. That is
18 testimony by Mr. Hefter.
19 MR. HEFTER: I will withdraw that, your Honor.
20 Q. It is stated different here, is it not?
21 A. I would like to be able to compare them side to side. I
22 didn't memorize the previous one.
23 Q. It states we agree with the overwhelming --
24 A. Okay, good.
25 Q. Are those statements the same or different?

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Whidby-cross-Hefter

1 A. Well, the one on the top says there is. The one on the
2 bottom says we agree.
3 Q. On the top one there's no statement that Philip Morris
4 agrees with that statement; is that correct?
5 A. There's no statement Philip Morris agrees with that.
6 Q. The bottom statement made in June of 2000 --
7 A. I'm sorry for interrupting. That's Philip Morris' web
8 site --
9 Q. I didn't catch that, I'm sorry, but I will move on.
10 It says: We agree with the overwhelming medical and
11 scientific consensus that cigarette smoking causes lung
12 cancer, heart disease, emphysema and other serious diseases in
13 smokers. Smokers are far more likely to develop serious
14 diseases like lung cancer, than nonsmokers.

15 Do you recall that you provided another -- more
16 testimony on this issue in June of the year 2000?
17 A. I won't argue that I did. I don't recall it explicitly.
18 Q. Let me refer you to page 98 of your deposition testimony
19 in the Falise case. It is dated June 23rd, the year 2000.
20 Let me show you your testimony.
21 MR. BLEAKLEY: Page.
22 MR. HEFTER: Page 98.
23 Q. Is that your testimony, Dr. Whidby?
24 A. Yes, it is.
25 Q. May I take it and put it on the Elmo and you will be able
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Whidby-cross-Hefter

1 to read it from there?
2 A. Sure.
3 Q. Now, in June of the year 2000, same month Philip Morris
4 comes out with its new web site, you're asked: "And Philip
5 Morris there on that web site is saying that people should
6 look to what the Surgeon General is saying, correct?
7 "Answer: That's what it says.
8 "Question: Do you know if smoking causes cancer?
9 "Answer: I think so, yes, it does. As commonly
10 used, it does, yes.
11 "Question: Smoking does cause cancer?
12 "Answer: Yes. As commonly used, yes.
13 "Question: What do you mean by 'as commonly used'?
14 "Answer: As the Surgeon General has determined from
15 statistical association between disease and smoking, I think
16 it does."
17 Is that your testimony on that date?
18 A. Yes, it was, which is again not inconsistent with what
19 I'm saying today.
20 Q. Today you're stating that smoking does cause lung cancer,
21 correct?
22 A. It does and it did then and it did in '61 or when I
23 graduated from high school and we talked about it. The
24 problem is I am not an expert in this area and I don't still
25 know what in smoke causes lung cancer. If you ask me what
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Whidby-cross-Hefter

1 cause -- if you ask anybody else what causes it they can't
2 answer that either.
3 Q. Your testimony here today is smoking does not cause lung
4 cancer?
5 A. No, I said it did.
6 Q. But on November 19th --
7 A. I can't tell you what in it, what compounds in it does.
8 Q. On November 19th, 1999, in response to that question you
9 said you didn't know?
10 A. Still don't know what in smoke causes it.
11 Q. November 19th, 1999 you didn't say you still didn't know
12 what caused it within the cigarette, did you?
13 A. That was my testimony at the time.
14 Q. But you didn't say it, did you?
15 A. I thought they were asking did I know what in cigarette
16 smoke causes it. No, I didn't know. I'm not arguing with
17 you. I just...
18 Q. There's nothing in your testimony on that case on
19 November 19th, 1999 that puts the qualifier on it that you

20 just don't know what's in it that causes cancer; isn't that
21 right?
22 A. What I'm saying there it is not my area of expertise. I
23 was -- it also talks about being a scientist, right, at the
24 bottom of this testimony, and, as a scientist, in order to
25 correct the problem I need to know what's in that smoke that
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Whidby-cross-Hefter

1 we could take out and correct the problem. I still don't know
2 that. What I did was to rely upon the public health
3 community, toxicologists within Philip Morris to tell me what
4 to take out and reduce. That's what we did.
5 Q. My only question is that's not stated there?
6 A. I'm talking about science then at the bottom. On that
7 particular page, no, it's not.
8 Q. Few final questions, Dr. Whidby, and then I'll be done.
9 We talked about general areas where Philip Morris was
10 trying to make a safer product. All the while it is true, is
11 it not, that Philip Morris is still selling products that
12 cause lung cancer?
13 A. Yes.
14 Q. It is true, is it not, that Philip Morris is selling
15 products during the time -- during that whole period of time
16 that causes heart disease?
17 A. Yes.
18 Q. It is true, is it not, Philip Morris is selling products
19 that cause emphysema?
20 A. Yes.
21 Q. It is true, is it not, that Philip Morris throughout that
22 entire period of time is selling products that cause kidney
23 cancer?
24 A. I won't argue with that, I don't know that.
25 Q. It is true, is it not, during that entire period of time,
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Whidby-cross-Hefter

1 Philip Morris was selling products that cause chronic
2 obstructive pulmonary disease?
3 A. I believe that's correct, yes.
4 MR. HEFTER: No further questions.
5 MR. BLEAKLEY: Good afternoon.
6 JURORS: Good afternoon.
7 REDIRECT EXAMINATION
8 BY MR. BLEAKLEY:
9 Q. Dr. Whidby, in 1972, when you went to work for Philip
10 Morris, did you have a personal belief as opposed to a
11 scientific opinion that cigarette smoking caused lung cancer?
12 A. Yes, I did.
13 Q. Let me go back to some questions Mr. Hefter asked you
14 earlier. One of the questions that he asked you is whether, I
15 think it was in 1972, I may not have the date exactly right,
16 whether Philip Morris told the public about the presence in
17 cigarettes of things like polycyclic aromatic hydrocarbons,
18 phenols. I can't remember the complete list of things.
19 Do you remember he asked you that?
20 A. Yes, sir.
21 Q. And you said -- what did you say, you didn't know, or
22 they didn't?
23 A. I don't know if they did or not.
24 Q. Was it a secret in 1972 that cigarettes had polycyclic

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Whidby-redirect-Bleakley

- 1 MR. HEFTER: Objection, your Honor.
2 THE COURT: I will allow it.
3 A. It was widely known in the literature.
4 Q. Was it known that cigarette smoke had phenols in them in
5 1972?
6 A. Yes.
7 Q. Was it known that cigarettes --
8 THE COURT: You're asking him now about his knowledge
9 when he was a researcher?
10 MR. BLEAKLEY: Yes. In the published scientific
11 literature.
12 Q. Was it known in the published scientific literature in
13 1972 that cigarette smoke contained heavy metals?
14 A. Yes.
15 Q. Was it known in the published scientific literature in
16 1972 that cigarettes contained nitrosamines?
17 A. Yes.
18 Q. Carbon monoxide?
19 A. Yes.
20 Q. Mr. Hefter asked you some questions about the work you
21 did with the Commonwealth of Massachusetts in -- I can't
22 remember what year it was -- 1990?
23 A. Started in the late nineties and continues today.
24 Q. Has most of that been done since you have been a
25 consultant or both?

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Whidby-redirect-Bleakley

- 1 A. Both, but most of it since I have been a consultant, yes.
2 Q. And Mr. Hefter asked you about some tests that were being
3 done that used different puff volumes than the FTC method,
4 different duration, and what was the other difference?
5 A. Puff volumes, the interval between puffs and blocking
6 ventilation.
7 Q. Commonwealth of Massachusetts was experimenting with
8 different standards for those three?
9 A. Yes, sir.
10 Q. Did you know that at approximately the same time the
11 Commonwealth of Massachusetts was doing this kind of work that
12 the Federal Trade Commission considered changing its
13 measurement method?
14 A. I was involved with that work, also.
15 Q. And that the Federal Trade Commission sent out a notice
16 to request comments on proposed changes in the FTC test that
17 would incorporate many of the same things the Commonwealth of
18 Massachusetts was considering; is that right?
19 A. Yes, sir.
20 Q. And did you know whether the Federal Trade Commission
21 today, in 2001, has adopted those changes in methodology?
22 A. They have not.
23 Q. Is it a fact the Federal Trade Commission today, 2001,
24 still uses the same method that it did before?
25 A. Same method, yes.

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Whidby-redirect-Bleakley

1 Q. And companies like Philip Morris are still required
2 today, in 2001, to place on the cigarette packs the tar and
3 nicotine content as measured by the FTC method?
4 A. Placed on the pack, yes, the FTC method, yes.
5 Q. Is required in the advertising?
6 A. Yes.
7 MR. BLEAKLEY: Would you put up 1.3 again, Dave.
8 Q. We looked at this a number of times. I believe you
9 testified in response to a question from Mr. Hefter that this
10 chart or this graph, not the part that identifies filtration
11 and tar and nicotine yields, was lifted directly from an
12 article by Dr. Hoffmann?
13 A. 1995 article.
14 Q. 1995 by Dr. Hoffmann?
15 A. Yes.
16 Q. Dr. Deitrich Hoffmann, is he a well known member of the
17 public health community?
18 A. Yes, he is.
19 Q. Now, you said that Philip Morris knew about the
20 phenomenon of compensation back in the 1970s; is that right?
21 A. What we knew is people smoked different from each other.
22 Q. And they might compensate --
23 A. They could.
24 Q. -- in using low tar cigarettes?
25 Was that also known in the public scientific
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Whidby-redirect-Bleakley

1 literature in the 1970s?
2 A. Yes, it was.
3 Q. Was that known to people in the public health community
4 like Dr. Deitrich Hoffmann?
5 A. Yes, it was.
6 Q. Do you know whether public health officials like
7 Dr. Deitrich Hoffmann continue to recommend the manufacture
8 and sale and use by people who smoked of low tar and nicotine
9 cigarettes?
10 A. Yes, they do.
11 Q. Into the 1980s and 1990s?
12 A. Yes, they did.
13 Q. Mr. Hefter asked you whether or not Philip Morris or any
14 of its affiliates did biological tests comparing the tar and
15 nicotine contents specifically of Marlboros and Marlboro
16 Lights. Do you remember that?
17 A. Yes.
18 Q. He also asked you about Marlboro Ultra Lights. My
19 question is this: Has Philip Morris done over the years
20 biological tests on research or reference cigarettes, you tell
21 me which, if the case, research or reference cigarettes that
22 have the same tobacco blends, identical or nearly identical
23 tobacco blends and the same identical or nearly identical
24 quantities of tar and nicotine?
25 A. Yes, it had.

M. BRYMER, RPR, OCR

4907

Whidby-redirect-Bleakley

1 Q. Has Philip Morris conducted -- is it research or
2 reference cigarettes?
3 A. Research cigarettes.
4 Q. Has Philip Morris done biological tests on cigarettes
5 with the identical or nearly identical tobacco blends and tar

6 and nicotine content as Marlboro Lights?
7 A. Yes, we have.
8 Q. Is the same true with respect to Marlboro Ultra Lights?
9 A. Yes, they have.
10 Q. Now, would you explain to the jury again why it is that
11 Philip Morris uses reference cigarettes and research
12 cigarettes in its biological testing instead of branded
13 commercial cigarettes?
14 A. Because we need to have very consistent and very
15 accurately made cigarettes. Commercial cigarettes vary over
16 time because of different blends that come about and -- or the
17 different blends of tobaccos that come from the farm, excuse
18 me, are different from crop year to crop year and the
19 manufacturing process is not as precise as we can do in a
20 controlled situation.
21 Q. Is the use of reference and research cigarettes standard
22 throughout the tobacco industry?
23 A. Yes, it is.
24 MR. HEFTER: Your Honor, I'm going to object to the
25 leading.

M. BRYMER, RPR, OCR

4908

Whidby-redirect-Bleakley

1 THE COURT: I will allow it.
2 Q. To the best of your knowledge, is the use of reference
3 and research cigarettes standard throughout the tobacco
4 industry within the rest of the world?
5 A. Yes, it is.
6 Q. To the best of your knowledge, is the use of research and
7 reference cigarettes standard by universities and public
8 health organizations?
9 A. Yes. They use the same cigarettes.
10 Q. People like National Cancer Institute?
11 A. Yes, sir.
12 Q. You were shown a document PTX0849.
13 MR. BLEAKLEY: Can you put that back up on the screen
14 a moment, please.
15 Q. Do you remember being shown by Mr. Hefter this memorandum
16 from Dr. Fagan to Dr. Wakeham dated March 1974?
17 A. Yes, sir.
18 Q. You said you hadn't seen this memorandum before; is that
19 right?
20 A. That's right.
21 Q. Now, Mr. Hefter read to you from paragraph one of this
22 memorandum. I would like to take a look at paragraph two.
23 Let's look at paragraph one again.
24 MR. BLEAKLEY: Highlight both paragraphs one and
25 two.

M. BRYMER, RPR, OCR

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Whidby-redirect-Bleakley

1 Q. What Dr. Fagan said in this memorandum to Dr. Wakeham is
2 that some concern has been expressed concerning the moral
3 obligation of Philip Morris and perhaps the tobacco industry
4 to reveal to the FTC the fact that some cigarette smokers may
5 be getting more tar than the FTC rating of that cigarette. Do
6 you see that?
7 A. Yes.
8 Q. And paragraph two is what Dr. Fagan says to Dr. Wakeham
9 about what he believes?
10 A. Right.

11 Q. He says: I believe that there need be no such concern,
12 at least from a position of morality. It is obvious that HEW
13 knows that smokers can vary their intake. Otherwise -- HEW is
14 the Department of Health, Education and Welfare?
15 A. Yes.
16 Q. Which includes the U.S. Public Health Service?
17 A. Yes.
18 Q. Which includes the Surgeon General's office?
19 A. Right.
20 Q. Last question, Doctor, would be Mr. Hefter asked you some
21 questions about Accord and the conclusions that were reached
22 in demo 00087.
23 MR. BLEAKLEY: I can't remember the number on it.
24 Would you find that, Dave. You got it.
25 Q. Do you remember Mr. Hefter asked you about this document?
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Whidby-redirect-Bleakley

1 A. Right.
2 Q. Do you have any reason to believe, or any knowledge that
3 Philip Morris has made with respect to this Accord product
4 which is still in test market, any claims to the American
5 public that Accord is safer than other cigarettes?
6 A. No, we have not.
7 MR. BLEAKLEY: I have nothing further.
8 MR. HEFTER: Few questions, your Honor.
9 THE COURT: All right. Be brief.
10 RECROSS-EXAMINATION
11 BY MR. HEFTER:
12 Q. Dr. Whidby, are you telling the jury that the research
13 cigarettes that you use in your tests are identical to
14 cigarettes in a package of Marlboro Reds?
15 A. No, sir. I'm telling them they're not identical.
16 Q. They're different?
17 A. They're different.
18 Q. Is it your testimony that the fact that there were
19 nitrosamines and polycyclic aromatic hydrocarbons and the
20 other bad actors in cigarette smoke was known to the American
21 public?
22 A. It was public information, it was out there. I can't say
23 what all the American public knew.
24 Q. It is not your testimony the American public knew there
25 was nitrosamines and other bad actors in cigarette smoke?
M. BRYMER, RPR, OCR

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Whidby-recross-Hefter

1 A. As published by the Surgeon General.
2 Q. Your testimony is that the public health authorities were
3 aware of it. My question is is it your testimony that the
4 average smoker in the United States or any smokers in the
5 United States were aware that there were nitrosamines and
6 other bad actors in smoke?
7 A. I'm sure a lot of smokers knew. I knew. Did every
8 smoker know, I don't think so.
9 Q. Mr. Bleakley just asked you about proposed changes to the
10 FTC smoking parameters by the FTC. Are you aware that Philip
11 Morris recommended and commented to the FTC that the FTC
12 measures should remain the same?
13 A. Yes.
14 MR. HEFTER: No further questions.
15 THE COURT: All right. Thank you, sir.

16 THE WITNESS: Thank you, sir.
17 MR. GARNICK: Your Honor, our next witness, defense
18 calls Dr. Peter English.
19 P E T E R E N G L I S H , called as the witness
20 herein, having been first duly sworn, testified as follows:
21 THE COURT: Give your name, please.
22 THE WITNESS: My name is Peter English.
23 THE COURT: Okay.
24 DIRECT EXAMINATION
25 BY MR. GARNICK:

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English-direct-Garnick

1 Q. Good afternoon, Dr. English.
2 A. Good afternoon.
3 Q. Would you please introduce yourself to the jury.
4 A. My name is Peter English.
5 Q. There might be a microphone.
6 Dr. English, what is your profession?
7 A. I have two professions. I'm a historian of medicine and
8 a primary care pediatrician.
9 Q. What is a historian of medicine?
10 A. Historian of medicine studies the progress of medicine
11 over time.
12 Q. Can you tell the jury some of the things that a historian
13 of medicine may study.
14 A. Yes. One of the things we study is the accumulation of
15 knowledge, for example, germ theory of disease, the
16 development of knowledge about infectious diseases and
17 epidemics. Historian of medicine studies famous discoveries
18 such as Alexander Fleming, who discovered penicillin, or John
19 Anders, who was instrumental in discovering the measles
20 vaccine. Historian of medicine studies peoples who are
21 particularly vulnerable to illnesses such as immigrants when
22 they came to this country. Historian of medicine studies
23 particular diseases such as cancer or heart disease.
24 Historian of medicine also studies institutions, institutions
25 like the intensive care nursery, history of that, or history

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English-direct-Garnick

1 of ambulance or hospitals. We do a number of things.
2 Q. Thank you.
3 MR. GARNICK: Dave, can we have slide 22.2.
4 Your Honor, this is Exhibit 1400.
5 Q. Dr. English, does this exhibit reflect your --
6 THE COURT: This is a demo only, isn't it?
7 MR. GARNICK: Yes.
8 Q. Does this demonstrative reflect your professional
9 educational background?
10 A. It does.
11 Q. Let's go through it. You have a Ph.D., correct?
12 A. Yes, I have a Ph.D. in history from Duke.
13 Q. You received it in 1975?
14 A. I did.
15 Q. You also have a medical degree, correct?
16 A. Yes.
17 Q. You also received that from Duke?
18 A. Yes, also in 1975.
19 Q. What is your current occupation?
20 A. I am a professor of history at Duke and a professor of

21 pediatrics at Duke.
22 Q. You have a dual appointment?
23 A. Yes. I have sort of a rare appointment. True dual
24 appointment in that I have separate offices and separate
25 E-Mail addresses and separate telephone numbers. You know,
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English-direct-Garnick

1 but, yes.
2 Q. Let's explore the medical historian side of your
3 professional career. First, is the history of medicine a
4 separate field of study?
5 A. Yes, it is. It is a small group of historians. It is
6 really a subset of both medicine and history. It is a small
7 group of people. We have our own journals, we have our own
8 organizations, but, yes, we are a recognized group within
9 those disciplines of history and medicine.
10 Q. And have you published articles in this field of the
11 history of medicine?
12 A. Yes, articles and books.
13 Q. Have you published articles in peer review journals?
14 A. Yes.
15 Q. Specializing in the history of medicine?
16 A. Yes.
17 Q. Have you yourself been a peer reviewer for journals
18 specializing in the history of medicine?
19 A. Yes, I have.
20 Q. Have you served on editorial boards for journals
21 specializing in the history of medicine?
22 A. Yes, I have. There are two journals of the history of
23 medicine in this country, the Bulletin of History of Medicine
24 and the Journal of the History of Medicine Allied Sciences.
25 I've reviewed articles for them, I have been a member of their
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English-direct-Garnick

1 board of both of those journals.
2 Q. As a professor of history at Duke University, have you
3 taught classes in history, history of medicine?
4 A. Oh, yes. I've been teaching history of medicine since
5 1978.
6 Q. What kinds of students, university students do you teach?
7 A. I teach undergraduate students, I teach graduate
8 students, I teach medical students and I've also taught in
9 masters of arts and liberal studies which are returning
10 students.
11 Q. Do you talk about the history of smoking and health in
12 your classes?
13 A. Yes. For over twenty years I have taught about smoking
14 and health in classes. It is one of the most important public
15 health stories of the 20th century. Every time I teach a
16 course that deals with 20th century medication or 20th century
17 public health I include a section on smoking and health.
18 Q. Now, have you recently taught classes in which you talked
19 about smoking and health more than other classes?
20 A. Well, currently, in fact, I just gave the exam in my
21 course on 20th century medicine so that is a course that I
22 always -- when I teach it I always include smoking and health
23 and I also teach a course on epidemic disease and public
24 health in the 20th century and I always include smoking and
25 health issues on that.

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English-direct-Garnick

- 1 Q. Within the field of smoking and health, what areas do you
2 talk about in the class?
- 3 A. A number of areas. One of the things I do is I point to
4 the development of -- or at least the beginning of the
5 appreciation that this was a concern in the years before 1950,
6 I talk about the beginning of scientific evidence about the
7 relationship between smoking and health that began in 1950,
8 some of the controversies and debates in that literature up
9 through the publishing of the first Surgeon General's report
10 in 1964, and then I spend quite a bit of time on the public
11 health community's responses to the knowledge that smoking
12 caused lung cancer and other diseases.
- 13 Q. As a historian, do you have any background or expertise
14 in understanding and interpreting polls?
- 15 A. Well, as part of our education and training as a
16 historian we learned about polls. Polls are used in many
17 areas of history and, so, we were trained to be able to
18 evaluate polls.
- 19 Q. Do you yourself teach polls to your history students?
- 20 A. Yes. In fact, many times in my classes we talk about
21 public opinion polls and relating to not only smoking but
22 other areas, too.
- 23 Q. Have you used polls in your own professional
24 publications?
- 25 A. Yes, I have. I have occasionally used polls in some of

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English-direct-Garnick

- 1 the books that I've published.
- 2 Q. Okay. Let's talk about the pediatrician side of your
3 professional career. What did you do after you graduated from
4 Duke medical school in 1975?
- 5 A. I came to New York City. I was an intern in and junior
6 resident at New York Hospital Cornell.
- 7 Q. What did you do after that?
- 8 A. Then I returned to Duke and completed my third year of
9 senior residency at Duke, and then went on the faculty of Duke
10 at that point.
- 11 Q. Faculty at that time of both the medical school and the
12 department of history at Duke?
- 13 A. Yes. I joined both the faculty of arts and sciences and
14 medicine at that time.
- 15 Q. As a professor of pediatrics, do you currently teach
16 medical students how to treat children?
- 17 A. Yes. I teach them in two settings. I teach them in new
18 born nursery and in problems of health in a newborn and I
19 teach them in our pediatric clinics.
- 20 Q. And on top of all that do you yourself treat children?
- 21 A. Yes. I'm part of an active primary care practice.
- 22 Q. How often do you see patients?
- 23 A. Three days a week.
- 24 Q. In fact, are you supposed to see patients tomorrow?
- 25 A. Yes, I am.

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English-direct-Garnick

- 1 Q. So, you won't be with us tomorrow?

2 A. No, no. I have quite a few patients to see tomorrow
3 morning.
4 Q. We'll see you again on Friday?
5 A. I'll be back.
6 Q. Are you board certified in pediatrics?
7 A. Yes, I am.
8 Q. Now, in dealing with your patients, do you ever talk
9 about smoking and health issues?
10 A. Oh, absolutely. In fact, I begin talking about smoking
11 issues when I had prenatal visits. In fact, I had a prenatal
12 visit yesterday and when parents come in and say what can I do
13 for a healthier baby I talk about smoking and then I continue
14 to talk about that once the baby is born and to parents about
15 problems with smoking inside the house. And then I begin my
16 education with children usually in the examination right
17 before they go to kindergarten and I ask them about smoking
18 and then on every subsequent visit it is one of the things I
19 almost always bring up just to make sure I continue that all
20 the way through until they leave my practice which would be
21 when they graduate from college at 22.
22 Q. Just to clarify, is your work in the field of history of
23 medicine limited to pediatrics?
24 A. In the history of medicine?
25 Q. Yes.

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English-direct-Garnick

1 A. Oh, well, I, of course, I gravitate towards issues that
2 pertain to child health. I've also written on the history of
3 surgery and a number of other areas and when I teach the
4 history of medicine I teach from pre history to the 24th
5 century.
6 Q. Dr. English, have you testified in court before?
7 A. Yes, I have.
8 Q. What type of cases?
9 A. I've testified at a number of times in child abuse cases.
10 Q. For which side?
11 A. The child.
12 Q. Have you ever testified in a smoking health case before?
13 A. No. This is the first time.
14 MR. GARNICK: Your Honor, we offer Dr. English as an
15 expert in the history of medicine and the history of public
16 health.
17 THE COURT: He may give his opinions.
18 Q. Dr. English, have you made a series of demonstrative
19 exhibits to assist your testimony?
20 A. Yes, I have.
21 MR. GARNICK: 22.3. Your Honor, this is just a
22 demonstrative, 748.
23 Q. Dr. English, does this demonstrative identify the
24 questions you're asked to address in connection with this
25 case?

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English-direct-Garnick

1 A. Yes, it does.
2 Q. Can you take us through these demonstratives and identify
3 those questions.
4 A. The questions I was asked to address was was there a
5 scientific debate over whether smoking causes disease in the
6 years before the issuing of the first Surgeon General's report

7 in 1964. The second question was what was the public health
8 community's response to the information, scientific
9 information about the dangers of smoking, and, then, three was
10 to determine the effectiveness of the public health
11 community's response.

12 Q. Have you researched these questions?

13 A. Yes, I have.

14 Q. Let's first talk about what research you've undertaken in
15 attempting to answer these three questions.

16 MR. GARNICK: Let's have slide 22.4, please. Your
17 Honor, this is demonstrative 161.

18 Q. Dr. English, does this demonstrative reflect the research
19 you conducted for the time period before the 1964 Surgeon
20 General's report?

21 A. Yes, it does.

22 Q. Why don't you take us through the demonstrative and
23 summarize for the jury what you did to research these three
24 questions before 1964.

25 A. I set out to find every significant scientific medical
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English-direct-Garnick

1 and public health article on the issue of smoking and health
2 between 1900 and 1964, and the way I did this was to go to the
3 standard index of medical -- the Wohl's medical literature and
4 that's an index published on a monthly basis. I went through
5 month by month getting -- assembling these articles in these
6 years. I also looked at standard textbooks in pathology, in
7 surgery, in medicine and cancer in the standard journals.
8 Then, to make sure that I didn't miss any significant articles
9 I went to the first Surgeon General's report in 1964. That
10 committee had reviewed 7,000 publications and I checked, sort
11 of cross-checked my own list that I had come up with to make
12 sure I had seen and read the important ones.

13 I also researched the annual reports and activities
14 of public health organizations such as the American Cancer
15 Society, American Heart Association, their educational
16 materials and other activities, and I also was particularly
17 interested in accounts of the smoking and health discussion
18 that had been carried out -- that had been written by
19 participants. People like Ernst Wynder, Deitrich Hoffmann.
20 All these people have written or many people have written
21 their own accounts and memoirs and I looked at these as well.

22 Q. And you did all this research in connection with the time
23 period before 1964?

24 A. Yes, that's correct.

25 MR. GARNICK: Let's see slide 22.5. Your Honor, this
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1 is demonstrative 41.

2 Q. Dr. English, does this demonstrative reflect at least
3 some of the research that you conducted for the time period
4 after 1964?

5 A. Yes, it does. There is a second one.

6 Q. We'll get to that.

7 A. Okay.

8 Q. Can you take us through this demonstrative and summarize
9 for the jury some of the research that you conducted in
10 formulating your opinions for the time period after 1964?

11 A. Yes. Of course, the 1964 Surgeon General's report was

12 just the first. There has been an annual once since 1967.
13 I've read all of those up until the one that just was issued.
14 I have not read that last one.

15 In the Surgeon General's report there are very
16 extensive bibliographies. I've read those bibliographies and
17 in this period, post '64 period, it is possible to do computer
18 searches. The ones I did before 1964 had to be hand manual
19 searches and I've done hundreds of computer searches on
20 various topics. So, altogether I've read thousands of
21 scientific articles on smoking and health in this period.

22 Because the second question that I was interested in
23 was the public health community's response, I researched the
24 activities and materials of the American Cancer Society and
25 American Heart Association, their educational material, what

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1 they prepared for school children, their comic books they try
2 to reach them with, what they did for health related education
3 on the job, number of things, and then I was also interested
4 in because the federal government is part of the public health
5 community, I was interested in what the federal government
6 did. So, I researched the regulations, the warnings,
7 restrictions of the various educational programs that the
8 federal government did in the area of smoking and health, as
9 well as the extensive research programs that the American
10 government did.

11 MR. GARNICK: Let's go to the next slide, 22.6. Your
12 Honor, this is demonstrative 382.

13 Q. Dr. English, why don't you just continue.

14 A. Yes. I -- to get an understanding of what the public is
15 being presented, I read every article in -- on smoking and
16 health that appeared in four New York City newspapers. Those
17 were Newsday, Daily News, The Post and New York Times. I also
18 was interested in the popular magazines and to determine about
19 this issue I went to the standard bibliographical tool which
20 is Readers Guide, a periodic literature, looking for articles
21 on smoking and health and magazines such as Time and Newsweek
22 and U.S. News and World Report, but I was also interested in
23 what was in teen magazines and what was in school health
24 magazines and women's groups. Then, the final thing I did was
25 to research public opinion polls, including those by the

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1 Premier organization and the Gallup organization.

2 Q. Dr. English, before we get into the details of your
3 opinions, I would like to ask you to give the jury a brief
4 overview or road map of what your opinions are in this case.

5 MR. GARNICK: I think we have the board on this. It
6 is slide 22.67. Your Honor, this is demonstrative 1753.

7 A. My research shows that there was a vigorous scientific
8 debate over whether smoking caused disease in the years before
9 1964, and the public health community had a massive
10 educational and public health campaign on this issue which I
11 guess best summarized is stop smoking if you are, don't start
12 if you haven't, and then the point there on number two is that
13 if you're going to smoke, smoke low tar.

14 Then, my research also in number four was that the
15 American people heard and understood the message that smoking
16 kills and causes disease.

17 Q. We'll get to each of these opinions in due course.
18 Let's go ahead and move to the first question which
19 was whether there was a scientific debate over whether smoking
20 causes disease before the 1964 Surgeon General's report. Did
21 your research reveal the existence of any hard scientific
22 evidence, credible scientific evidence linking smoking to lung
23 cancer in the time period before 1950?
24 A. No, it did not. I didn't see any hard evidence. By hard
25 evidence, the way evidence in smoking and lung cancer

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1 developed came from the sciences of statistics, experimental
2 biology and toxicology and in the period prior to 1950 there
3 were no hard scientific articles of that nature.
4 Q. Well, was there any discussion in the medical
5 literature --
6 MR. GARNICK: Dave, you can take that down.
7 Q. Was there any discussion in the medical literature about
8 smoking and disease at all before 1950?
9 A. Oh, yes, there was quite a bit and there was some on
10 smoking and lung cancer, also. In the years before 1950s
11 decades, before 1950 the public health community began to note
12 an increase in the number of cases of lung cancer and lung
13 cancer had been a very rare form of cancer and, so, when it
14 first came this was noted and initially there was some --
15 there was a question that was raised was this actually -- were
16 these actually new cases or had the x-ray had been recently
17 developed and put into practice or was it really the result of
18 metadiagnostic techniques, but yes this was noted. And in
19 regard to this, of course, people raised the issue of why.
20 Why was a tumor that had once been considered quite rare, why
21 was it increasing, and there were a number of speculations
22 that were put forth.
23 Q. What were some of the speculations about the rise in the
24 incidence of lung cancer before 1950?
25 A. Well, the first one to come up was whether lung cancer

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1 was in any way related to the terrible influenza epidemic.
2 That was the one that damaged so many lungs. People wondered
3 whether this was a late consequence of the influenza
4 epidemic. Other people thought perhaps it was related in some
5 way to tuberculosis, which in the years before 1950 was one of
6 the leading causes of death. But there were others. People,
7 scientists began to look to the environment. We made a lot of
8 progress in the last 50 years by just looking at photographs
9 from 1930 and '40 and what it must have been like to live in
10 Los Angeles or New York or London. People I think actually
11 looked at the air as one of the issues especially in
12 industrial pollutants and, also, the internal combustion in
13 cars. Cars, of course, didn't exist in any great extent by
14 1900 and certainly by 1930s and 40s were everywhere. Some
15 people thought it might have been the pavement because asphalt
16 was not widely used before the 20th century. But it was in
17 the context of all of these possible speculations that people
18 began to say, Well, perhaps it is cigarettes, cigarette
19 smoking.
20 Q. We have an example of an article that addresses smoking
21 and lung cancer before 1950, correct?

22 A. Yes. The one I chose, I think you have a --
23 Q. Yes, we will pull it up.
24 MR. GARNICK: This is slide 22.7, and, your Honor,
25 this is demonstrative 301 and this is an article by Churchill
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1 entitled "Primary Carcinoma of the Lung" in The Journal of the
2 American Medical Association in 1948. We would move this into
3 evidence.
4 THE COURT: Admitted.
5 Q. Let's start with this. Dr. English, who was
6 Dr. Churchill?
7 A. Edward Churchill was a prominent surgeon. He was
8 connected with the Harvard Medical School, Massachusetts
9 General Hospital, and he was widely known because of his work
10 as a surgeon during World War II, and I chose this particular
11 example partly because Dr. Churchill was a very prominent
12 surgeon, but, also because he was asked to summarize the
13 information on lung cancer by the American Cancer Society and
14 by the American Medical Association. So, what this is is, you
15 know, his -- he's working in several capacities. First as an
16 independent surgeon and scientist, but, also, on behalf of the
17 American Cancer Society and the American Medical Association.
18 Q. Now, this was published in The Journal of the American
19 Medical Association. What was that journal?
20 A. The Journal of American Medical Association is the
21 journal of that organization. It is one of the largest and
22 most widely circulated medical journals in the world.
23 Q. Was it widely circulated in 1948?
24 A. Oh, yes. Oh, yes.
25 Q. Let's go through this exhibit. The first quote is:
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1 Nothing is known about the cause of the disease. They are
2 referring to lung cancer?
3 A. Yes, yes.
4 Q. Nothing is known about the cause of lung cancer that can
5 be translated into effective preventive measures. Can you
6 tell the jury what that means?
7 A. Well, of all the speculations that were available in --
8 to him in 1948, he thought that no public health
9 recommendation could be -- could be made.
10 Q. About lung cancer at all?
11 A. That's correct.
12 Q. Let's go to the second one. Evidence that pulmonary
13 cancer -- again, that's the same thing as lung cancer?
14 A. Lung cancer, right.
15 Q. Evidence that pulmonary cancer was on the increase led to
16 several speculations about the causative agents, and among
17 other things, cigarette smoking was incriminated.
18 Can you --
19 A. Yes, I think what he's saying there is what I tried to
20 explain a moment ago was that there were -- I think his word
21 there is of course speculation, but there were many
22 speculations and in the list of possibilities was cigarette
23 smoking.
24 Q. Finally, further knowledge provides no factual evidence
25 on which advice to give up smoking for this reason can be
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1 based.
2 Can you tell us what that means?
3 A. Yes. I think that he then moved on to just address not
4 all the speculation but the speculations about cigarette
5 smoking. In that regard he said that as of 1948 there was no
6 knowledge that would lead to the recommendation to quit
7 smoking.
8 Q. Now, was this article by Dr. Churchill in 1948 consistent
9 with the state of medical knowledge at the time generally
10 throughout the country?
11 A. Yes, it was.
12 Q. When did the first hard evidence emerge suggesting a
13 possible link between smoking and lung cancer?
14 A. 1950.
15 Q. And have you developed a time line to map out the
16 emerging evidence?
17 A. I have.
18 MR. GARNICK: This is slide 22.8. Your Honor, this
19 is demonstrative 342.
20 Q. Let's start with the first entry. 1950, five
21 retrospective studies published. Dr. English, what is a
22 retrospective study?
23 A. Well, the first pieces of hard evidence in the area of
24 smoking and health came from the science of statistics and a
25 retrospective study is a particular form of statistical study

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English-direct-Garnick

1 where the scientist begins with -- with people with a known
2 disease and then asks questions that occur earlier and that's
3 why it is called a retrospective study. And in 1950 there
4 were five retrospective studies that dealt with the issue of
5 smoking and lung cancer and the one that I want to mention to
6 you is the one that is by Ernst Wynder. Ernst Wynder is
7 someone I know you heard a lot about. In 1950 I want to point
8 out to you he was a medical student. He was a medical student
9 working with a very senior person, Evarch Graham, and Evarch
10 Graham is important to the history of lung cancer, because he
11 is the surgeon who first removed a cancerous lung some twenty
12 years earlier.
13 So, this medical student and this very senior surgeon
14 identified 600 patients with a known diagnosis of lung cancer
15 and then as a control group had 600 of roughly the same number
16 of patients who did not have lung cancer and then asked those
17 two groups of people questions about their smoking and smoking
18 history. And what he found was that there was -- that
19 patients with lung cancer were far more likely to have been
20 heavy smokers.
21 Q. Did the scientific community at the time regard these
22 retrospective studies as proving that smoking causes lung
23 cancer?
24 A. No, they did not.
25 Q. Why not?

M. BRYMER, RPR, OCR

English-direct-Garnick

1 A. Well, in 1950, or, actually, even after 1950, a
2 statistician -- what Wynder did was he established an

3 association between smoking and lung cancer. Now,
4 statisticians knew the association was not a cause and I guess
5 a good example might be that there is a -- an association
6 between smoking and cirrhosis of the liver, but we know that
7 heavy smokers tend to be heavy drinkers and it is the alcohol
8 that causes the cirrhosis of the liver, not the smoking, and
9 statisticians knew that the causal link in association might
10 be something else altogether.

11 Q. Did the authors of these retrospective studies believe
12 that their studies proved that smoking caused lung cancer?

13 A. No, they didn't. I think I have a demonstrative.

14 Q. We do.

15 MR. GARNICK: Dave, 22.9. Your Honor, this is
16 demonstrative 1420.

17 Q. Dr. English, looking at this demonstrative, first article
18 is an article by Levin entitled "Cancer and Tobacco Smoking,"
19 a preliminary report published in The Journal of American
20 Medical Association in 1950. Can you go ahead and tell us --
21 go ahead and read this portion and tell us the significance to
22 your opinions in this case.

23 A. Sure. I mentioned the Wynder study. Levin study
24 actually appeared in the same issue. It is one of the other
25 of the five studies I mentioned, but what Dr. Levin said was

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English-direct-Garnick

1 that the data suggests, although they did not establish a
2 causal relationship between cigarette and pipe smoking and
3 cancer of the lung retrospectively, which is another way of
4 saying an association, he recognized that these -- this
5 association was not a causal statement.

6 (Continued on the following page.)

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English - Direct - Garnick

1 DIRECT EXAMINATION

2 (Cont'd) BY MR. GARNICK:

3 Q. Let's go to the second one which is an article by Schrek
4 published in Cancer Research.

5 I'm going to read it.

6 The correlation is definitely statistically
7 significant but is it biologically significant? A
8 statistical study cannot prove whether there is a cause and

9 effect relationship between 2 factors. At least the
10 statistical evidence can provide circumstantial evidence that
11 a correlation is likely significant.
12 Dr. English, what is the significance of that
13 statement here?
14 A. I think that it's a very good summary of how
15 statisticians looked at their work in 1950. By the way Schrek
16 is the author of one of the other 5 studies in that they were
17 not claiming that they had a caution statement, they were
18 merely pointing out they had made a statistical association
19 between the two.
20 MR. GARNICK: Your Honor, we move into evidence Demo
21 1420.
22 THE COURT: Yes, admitted.
23 (So marked Defendant's Exhibit 1420 in evidence.)
24 Q. Dr. English, what was the significance -- what was the
25 reaction of the scientific community to these 5 retrospective
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English - Direct - Garnick

1 studies?
2 A. I think that it was a very exciting moment because it was
3 the beginning of the hard evidence and one of the things that
4 happened right away was to do what statisticians did in the
5 early '50s when they had a connection. If they wanted to
6 prove a cause, the way they did that in the 1950s was to go to
7 the laboratory and that's exactly what they did.
8 MR. GARNICK: Your Honor, we are about to start the
9 second item in 1953. It would be a good time to break before
10 we get into that.
11 THE COURT: We have some motions anyway.
12 Be here at 10 to 10 tomorrow.
13 (Jury out at 4:15 p.m.)
14 (Recess.)
15 THE COURT: I'll be happy to hear the parties. We
16 have 2 sets of motions this afternoon. One of them deals with
17 the evidence problem under the conspiracy theory and the other
18 one deals with the motion to dismiss as a matter of law.
19 I suppose the conspiracy in theory comes first
20 because that determines what evidence is usable in the motion
21 to dismiss.
22 MR. FITZPATRICK: Your Honor, we really stand on our
23 papers. We don't have too much to add. You asked us for and
24 we provided what we think are the essential pieces of evidence
25 that indicates the conspiracy and we supplemented those with a
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1 few other pieces of evidence in the May 1, 2001 letter.
2 I hope your Honor has that. And we think that we
3 have established for evidentiary purposes that there was a
4 conspiracy and that the statements of any of the conspirators
5 are admissible as to all.
6 The other question you asked was late joiners to the
7 conspiracy and whether statements made in the course of the
8 conspiracy are attributable to them and we think that it's
9 clear under the law that they are not responsible for
10 substantive acts prior to the time they are doing the
11 conspiracy but the statements as a matter of evidentiary
12 admissibility may come in as against them as statements of the
13 conspirators at the time prior to their entry into the
14 conspiracy.

15 We have laid forth at some length the evidence we
16 think supports this.
17 THE COURT: As I read the briefs, your dates are set
18 forth on pages 8 and 9.
19 MR. FITZPATRICK: That's right.
20 THE COURT: Phillip Morris from 1954 to November 6,
21 1998 R.J. Renyolds, you just had 1998, what is the date?
22 MR. FITZPATRICK: I don't have a specific date,
23 your Honor.
24 And in fact I'm not sure, the CTR, it has to be the
25 same date because CTR was dissolved, we have indicated here
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1 November 6, 1998, the significance factor and dissolution of
2 CTR --
3 THE COURT: So you are asking for until November 6,
4 1998 for R.J. Renyolds?
5 MR. FITZPATRICK: No, your Honor, what we are saying
6 is that members of the conspiracy up to and including today,
7 we say that the evidence that shows that they are members in
8 the CTR aspects of it, the evidence that was presented by
9 their control, their participation in CTR is such that CTR
10 stopped, ceased to exist.
11 THE COURT: You are claiming a conspiracy from 1954
12 to today's date?
13 MR. FITZPATRICK: Yes. What we say, and this in
14 this the introduction page 1. On page 2 of our brief we
15 indicate that the participants in the conspiracy that began in
16 late 1953 and continues even now except as expressly indicated
17 are, and we set that forth in the table that is on pages 1 and
18 2 of the brief, of our conspiracy submission.
19 We are referring to the end date of CTR. We are
20 simply acknowledging that the evidence of the conspiracy, that
21 CTR came to an end in November 1998 but we do not concede that
22 they have not acted in concert since then.
23 THE COURT: In what way?
24 MR. FITZPATRICK: They continue to spout the same
25 party line, they can't continue to deny or equivocate as to
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1 whether smoking causes disease. It wasn't until 2000 that
2 Phillip Morris even said that they agreed with what the
3 Surgeon General said, and as far as I know, R.J.R., the others
4 haven't gone as far as Phillip Morris has so they are still in
5 one way or another equivocating on these issues with very
6 similar types of equivocations.
7 They are not marketing, they are not marketing in any
8 general sense, rather there is some test marketing going on of
9 truly safer cigarettes and are not participating so I don't
10 think that there is any reason to conclude that the conspiracy
11 ended even as of today. Even as of today.
12 THE COURT: What about the so-called conspiracy --
13 I'm not sure if it's a separate one in your submission -- to
14 prevent the introduction of the safer cigarette?
15 MR. FITZPATRICK: Your Honor, we would allege that
16 that continues.
17 THE COURT: The general conspiracy you are alleging
18 is to mislead, right?
19 MR. FITZPATRICK: That's right.
20 THE COURT: What about the safer cigarette?
21 MR. FITZPATRICK: The safer regular cigarette

22 continues in that we have only the most sporadic effort to
23 promote a safer cigarette and we have some test marketing but
24 we certainly don't have any evidence of any all out effort by
25 any of those companies to market a safer cigarette.

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1 So there is no indication that the conspiracy which
2 there is a great deal of evidence started back in the '50s has
3 come to an end.

4 And as I said, we are talking about, there are so
5 many, we tried to indicate when certain indicia of the
6 conspiracy came to an end which is why we used the dates on
7 the CTR because it ceased to exist.

8 THE COURT: What about Liggett?

9 MR. FITZPATRICK: We say Liggett in effect withdrew
10 from the conspiracy, and I have the date here, I believe
11 1996. 1996, your Honor. It's clear that Liggett broke with
12 the rest of the industry on any number of fronts in 1968 so we
13 do not contend that they are any longer part of a post-1996
14 conspiracy. I don't see the page but we indicate that we do
15 concede that Liggett ceased to be a participant in the
16 conspiracy as of 1996.

17 THE COURT: TIRC ended its conspiracy according to
18 your -- it's participation in the conspiracy according to your
19 submission when it closed shop in November 1998, right?

20 MR. FITZPATRICK: That's right, your Honor, November
21 6, 1998 it was dissolved, I believe, by order of the Attorney
22 General of the State of New York.

23 THE COURT: And Liggett?

24 MR. FITZPATRICK: I'll give you the exact date in a
25 moment but it's 1996.

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1 THE COURT: What is Liggett's contention? When did
2 you get out.

3 MR. FEIWUS: We would say we got out in '95, '96.
4 We don't have the precise date.

5 THE COURT: All right, January 1996.

6 MR. FITZPATRICK: I apologize. It was right here on
7 the first page. We indicated in the table in the introduction
8 1996.

9 THE COURT: And your submission is Phillip Morris,
10 R.J. Renyolds, Brown & Williamson, American, the American is
11 when?

12 MR. FITZPATRICK: The American is now part of --
13 Brown & Williamson is the successor.

14 THE COURT: So it doesn't make any difference?

15 MR. FITZPATRICK: It doesn't make any difference.

16 THE COURT: Lorillard, Liggett joined, you say in --

17 MR. FITZPATRICK: 1959.

18 THE COURT: When?

19 MR. FITZPATRICK: Exact date? I have to provide
20 it, judge, I'm sorry.

21 THE COURT: When?

22 MR. FEIWUS: Your Honor, again, we don't contend
23 that we have joined. I think the date that plaintiffs are
24 trying to tie us to is the date we joined TI which is sometime
25 in 1959.

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1 THE COURT: When?
2 MR. FEIWUS: I'd say January 1959.
3 THE COURT: Joined in January 1959.
4 THE COURT: British American Tobacco 1953 to when?
5 MR. FITZPATRICK: British American Tobacco 1953 to
6 date.
7 THE COURT: British American 1953 to present and
8 B.A.T. Industries B.L.C., that's when it was organized?
9 MR. FITZPATRICK: Yes.
10 THE COURT: To present?
11 MR. FITZPATRICK: Yes.
12 THE COURT: I want to get your contentions right.
13 Tobacco Institute 1958 -- what is that, January?
14 MR. FITZPATRICK: That is the date we are using,
15 judge.
16 THE COURT: January 1958 to?
17 MR. FITZPATRICK: Again, it was dissolved in '99.
18 THE COURT: Again, in 1999. Tobacco research
19 committee.
20 MR. FITZPATRICK: This is CTR and its predecessor
21 TIRC.
22 THE COURT: That is January 1953?
23 MR. FITZPATRICK: Yes December 1953.
24 THE COURT: December?
25 MR. FITZPATRICK: Late 1953.
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1 THE COURT: December 1953 to dissolution when, in
2 1998 when, January 1998?
3 MR. FITZPATRICK: November 6, 1998, your Honor.
4 THE COURT: November 6, 1998. And Hill & Knowlton
5 1953 to date.
6 Have they been employed by these people?
7 MR. FITZPATRICK: No, they have not, they have
8 continued to deny in this litigation, denied that smoking
9 causes cancer. So I think that they have continued -- part of
10 the effect is a continuing conspiracy by their continued
11 denial of the truth we do not have any evidence that they were
12 employed by the tobacco industry.
13 THE COURT: I don't understand. If they are not
14 employed by anybody and they have no interest in it, why would
15 they be members of the conspiracy?
16 MR. FITZPATRICK: What they are doing, your Honor,
17 is for reasons I suppose of liability, but they are
18 nevertheless denying the fact that tobacco, that smoking
19 causes cancer.
20 THE COURT: You mean in this suit?
21 MR. FITZPATRICK: They have denied in basically any
22 litigation.
23 THE COURT: Where is Hill & Knowlton? Who is
24 representing them?
25 MR. BLEAKLEY: Hill & Knowlton has its own counsel
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1 but is not participating in the trial. We are representing
2 their interest, I think.
3 THE COURT: You are representing -- you are the
4 ambassador for Hill & Knowlton?
5 MR. BLEAKLEY: I am representing their interest now
6 in pointing out that their attorneys are not here in the
7 courtroom and we have to contact them if you needed to know.

8 THE COURT: I'm certainly not going to reach out for
9 them if they are not interested.
10 MR. BLEAKLEY: They are interested. It's all a
11 matter of expense.
12 THE COURT: When was the last date that they were
13 employed by any tobacco firm or entity?
14 MR. BLEAKLEY: It's been a long time.
15 THE COURT: I would think so.
16 MR. BLEAKLEY: And I don't understand the need for
17 --
18 MR. FITZPATRICK: Your Honor, whatever the date that
19 they ceased to be employed by the --
20 THE COURT: When is the last date that you have any
21 Hill & Knowlton document?
22 MR. BLEAKLEY: 1953, your Honor. Okay, 1954.
23 MR. FITZPATRICK: I think not, early '60s.
24 THE COURT: It's when?
25 MR. FITZPATRICK: Early 60s.
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1 MR. BLEAKLEY: I don't remember any early '60s
2 documents that have been admitted into evidence in this case
3 but if there are, it seems to me the burden should be on the
4 plaintiffs to show that and to make an argument that the
5 documents wherever they are support --
6 THE COURT: It seems to me the last date would be a
7 good date.
8 Nobody knows when they were employed by any tobacco
9 entity?
10 MR. BLEAKLEY: Not off the top of our heads.
11 Your Honor, we can find out.
12 THE COURT: The general rule on conspiracy as I
13 recall it is that when you depart from a conspiracy, you have
14 to make it known that you are departing. But silence for 50
15 years seems to me to have some evidentiary weight.
16 MR. FITZPATRICK: Your Honor, we will look at the
17 record and let you know.
18 We will withdraw our contention that they are still
19 part of the conspiracy. We will get you a precise date.
20 THE COURT: I'll make your contention now from 19 --
21 December 1953. Is that when they first started their
22 activities?
23 MR. FITZPATRICK: Yes, your Honor.
24 THE COURT: Until December 1963 but we'll refine
25 that to the last document that you are relying on which as I
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1 recall was the latest in the early '60s.
2 So anyway, that is your contention, right?
3 MR. FITZPATRICK: That's right.
4 THE COURT: I'm somewhat troubled by a number of
5 things, one of them of course is as I suggested, the
6 conspiracy not to provide a safer cigarette and the other
7 thing is the date on which it ended. They seem to have fallen
8 apart pretty much after they settled the state claims which
9 was when, when was that signed?
10 MR. FITZPATRICK: I believe it was 1997, your Honor
11 -- 1998. 1998. Spring of 1998. 1998. But, your Honor, I
12 think you are right in your observation that to end the
13 conspiracy, they have to have indicate a withdrawal from
14 conspiracy and they did not do that, they agreed with the

15 states to do certain things but as I said, it's another, even
16 until 2000 that we get something like a frank admission by
17 Phillip Morris and we don't really get that stating that it
18 agrees with the Surgeon General and we have all the rest of
19 them making more statements.

20 THE COURT: When did you bring your suit?

21 MR. FITZPATRICK: We brought the suit in April 29,
22 1998.

23 MR. WILLIAMS: Your Honor --

24 THE COURT: I haven't finished yet unless you have
25 some piece of information you want to provide.

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1 MR. WILLIAMS: Well, I do think that it's important
2 to point out what the evidence is on the safer cigarette
3 issue.

4 THE COURT: I'll give you a full opportunity. I
5 want to get the plaintiff's submission straight in my mind
6 before I hear from the defendant.

7 September, 1998. When did you actually file your.

8 MR. FITZPATRICK: We brought the case April 29,
9 1998.

10 THE COURT: April 1998.

11 Certainly by the time you brought the case, they were
12 out of the conspiracy, weren't they?

13 MR. FITZPATRICK: No, your Honor, they were still,
14 they hadn't settled when we brought the case, they had not
15 settled with the states and what happened is they settled the
16 Minnesota case within a short time after we brought the case
17 but they hadn't settled the other attorney generals lawsuit.

18 THE COURT: I suppose you could be a member of the
19 conspiracy and still be sued and take diverging positions as
20 defendants in the suit.

21 MR. FITZPATRICK: They certainly have maintained a
22 degree of unity. As I say, there is no indication that, to
23 leave a conspiracy, to no longer be participating in a
24 conspiracy the duration and this seriousness seems to me to be
25 an overt renunciation of the conspiracy. There is no

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1 indication of that. They agreed to certain things with the
2 states but they haven't stopped their basic behavior or
3 renounced their --

4 THE COURT: It wouldn't make any difference except
5 there were some statements by individual defendants which if
6 the conspiracy had ended could only be used against the
7 defendant who made the statement. So that the termination
8 date as well as the beginning date is significant.

9 MR. FITZPATRICK: And, your Honor, I believe that
10 the termination date can influence the damages because I'm not
11 an expert on the damage model, I have to say, but because the
12 damages we'll be allowed to show through I believe it's May of
13 this year.

14 THE COURT: Well, I'm not so sure everything was
15 pretty well-known. The damage problem is a separate problem
16 fairly confusing but it doesn't affect necessarily the
17 decision on the conspiracy dates for purposes of evidence
18 against some or all of the defendants.

19 Generally, the ruling on conspiracy is the same on
20 the evidentiary ruling and whether there is enough of the
21 conspiracy in the dates on the substantive issue but not

22 necessarily because in the conspiracy evidence problem the
23 judge has to be satisfied and the substantive issue, the rule
24 is could a reasonable juror find.

25 MR. FITZPATRICK: If we just stay with the
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1 statements and the admissibility, the statements that we are
2 dealing with I think are as far as I know --

3 THE COURT: Most of the statements occurred in the
4 '50s, '60s and '70s anyhow but there are some statements
5 later that you relied upon.

6 MR. FITZPATRICK: There are statements throughout
7 the years including statements that we introduced as late as
8 2000.

9 THE COURT: I have your position now sufficiently in
10 mind. Suppose I hear from the defendants on this.

11 MR. WILLIAMS: John Williams on behalf of R.J.
12 Renyolds.

13 I just want to address the termination of the
14 conspiracy, that issue. And I'm not sure that the law is as
15 your Honor indicated that we have to make affirmative
16 statements that we were not in the conspiracy that we contest
17 in the first place.

18 THE COURT: Not statements necessarily, statements
19 or acts, that is my recollection. I don't remember it being
20 thoroughly discussed in the papers but maybe it was.

21 MR. WILLIAMS: It is acts. If your conduct is
22 inconsistent with a conspiracy, that is sufficient to have
23 withdrawn from the conspiracy assuming the conspiracy existed
24 in the first place.

25 THE COURT: That is so, act or statements
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1 unequivocal.

2 MR. WILLIAMS: And in this case we have the
3 unequivocal acts and we heard about them from Dr. Farone who
4 testified that when R.J. Renyolds, my client, started to
5 market Premier, it, in his words, blew apart the conspiracy.
6 It blew apart the Jones agreement.

7 THE COURT: What was the date?

8 MR. WILLIAMS: That was in 1987, your Honor.

9 I think Dr. Farone had it 1986. I think it was
10 actually in 1987 when we came out with the marketing of this
11 although it had been in development before. It was
12 unequivocal. The argument was that we were in some sort of
13 conspiracy because we were not making health claims about
14 cigarettes and we were not producing a safer cigarette. And
15 that is totally inconsistent with the evidence, at least with
16 respect to R.J. Renyolds and with respect to the rest of
17 industry that was also working to develop safer cigarettes as
18 Dr. Farone indicated. It wasn't just my client, he testified
19 that there was a gentleman's agreement, he knew about at some
20 time but as a practical matter, despite the fact there were
21 these documents that said there was a gentleman's agreement,
22 Phillip Morris, R.J. Renyolds, Lorillard and Brown &
23 Williamson were all very, very hard at work breaking the
24 conspiracy and acting inconsistently with the conspiracy.

25 THE COURT: There are 2 problems, 1, you can renege
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1 on your promises privately without being out of the
2 conspiracy.

3 MR. WILLIAMS: Correct.

4 THE COURT: So the fact that they were working
5 behind the scenes isn't critical.

6 If they went public, it could be, I suppose,
7 critical. And then the problem is whether you have really 2
8 conspiracies, one not to open up with the public.

9 MR. WILLIAMS: Yes.

10 THE COURT: The fraud problem; and 2, failure to
11 create a safe cigarette problem. I don't know whether those
12 are 2 conspiracies or 1.

13 MR. WILLIAMS: Let me suggest that --

14 THE COURT: It may make some difference.

15 MR. WILLIAMS: Let me suggest this, it is the
16 plaintiff's burden to allege and prove whether it is one
17 conspiracy or whether it is 2 conspiracies. They have chosen
18 and that's why we pushed them to the proof to allege that it
19 was one conspiracy.

20 Let me address both aspects though of the
21 conspiracy. Number 1, with respect to the safer cigarette,
22 there was public conduct manifested that suggested the
23 conspiracy -- that shows the conspiracy was no longer in
24 effect. The one slender reed they cling to in their brief is
25 the statement of Dr. Harris.

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1 Dr. Harris got up to testify that while even though
2 R.J. Renyolds came out with Premier, it really was just a
3 sideshow, they really didn't mean it because they marketed it
4 as a safer cigarette.

5 (Continued on next page.)

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1 MR. WILLIAMS: (continuing) As he started to say
2 those words I rose to object. He wasn't qualified as an
3 advertising expert. Your Honor sustained that objection. He,
4 then, in cross-examination came around and stuck it in the
5 side door and they are clinging to that one little statement
6 where he tried to get in the fact that he didn't like the way
7 we were marketing because we weren't making in his view health

8 claims, we weren't talking about the fact we didn't have
9 controversial hazardous conduct.

10 That's the one thing they've said in the conspiracy
11 brief that suggests in their view that the conspiracy was
12 continuing. This renegade testimony of Dr. Harris, frankly,
13 should be stricken. Even if it is not stricken, the evidence
14 is inconsistent with it, because the evidence, and this was
15 demonstrative number seven, the little pack of Premiere
16 cigarettes that has on it an advertisement right on the front
17 that talks about how he had fewer controversial compounds in
18 it. It is a health claim according to Dr. Farone. So, there
19 is no evidence of conspiracy with respect to the safer
20 cigarette or with respect to the agreement that we weren't
21 going to make health claims. There's no evidence that has
22 continued past 1987, none.

23 Now, what they have said in their papers here, that's
24 about all they have said with respect to the safer cigarette
25 issue and that should be out of the case as of 1986, 1987. If
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1 for no other reason it is terribly confusing to the jury once
2 we start down the road. There is no evidence of it in the
3 first place and it just serves to confuse.

4 Now we're onto the other part of the conspiracy.
5 Even if the entire conspiracy were to be out, I assume they
6 would be arguing in the alternative, that there was this other
7 independent conspiracy I suppose to defraud the American
8 public.

9 THE COURT: The argument I suppose would be that
10 there's this conspiracy to defraud the public and the failure
11 to market a safer cigarette is just evidence of that. It is
12 not an independent conspiracy.

13 MR. WILLIAMS: If that's their conspiratorial
14 investigation -- it is hard for me to respond. I'm not sure
15 what the conspiratorial investigation is. I suppose --

16 THE COURT: I am trying to get it straight in my mind
17 for this purpose.

18 MR. WILLIAMS: We're trying to get straight in our
19 mind, too. They have pled one overarching conspiracy.

20 THE COURT: Right.

21 MR. WILLIAMS: We have shown affirmative withdrawal
22 from that part of the conspiracy.

23 THE COURT: If that's a separate conspiracy.

24 MR. WILLIAMS: If it is one conspiracy, we've
25 withdrawn from it.

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1 MR. GARNICK: Your Honor--

2 MR. WILLIAMS: If it is two independent
3 conspiracies --

4 MR. GARNICK: -- whether it is one aspect of an
5 overarching conspiracy or two conspiracies, it clearly in the
6 plaintiff's mind is more than just evidence of a conspiracy
7 dealing with deception, because there's a separate element of
8 damages solely for the failure to market a safer cigarette.

9 THE COURT: I understood that.

10 MR. GARNICK: Innovation component of Dr. Harris'
11 damage model is separate from failure to market a safer
12 cigarette. It has nothing to do with information, according
13 to Dr. Harris. It follows solely for the failure to market a
14 safer cigarette. So, clearly, in the plaintiff's case you

15 have conduct, deception that results in some kind of informal
16 damages, you have other conduct, failure to market a safer
17 cigarette, that results in a separate innovation.

18 THE COURT: The innovation applies to which cause of
19 action?

20 MR. GARNICK: It applies to the direct RICO claim,
21 subrogated RICO claim, the direct 349 and the subrogated 349.
22 The innovation component is already out of the subrogated
23 fraud claim. So, it applies to four causes of action. It is
24 about twenty percent. Plaintiffs have admitted -- have
25 already identified that component of their damage claim.

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1 THE COURT: Well, I'll take that problem up when we
2 get to the dismissal aspect. I understand they are related.
3 I said that during the early part of the argument, but I want
4 to focus on this evidentiary conspiracy issue.

5 MR. FITZPATRICK: Your Honor, if I may address it.
6 There are two aspects to the innovation. Whether we're
7 talking about there being one conspiracy among defendants or
8 multiple conspiracies, I think it is somewhat a matter of
9 semantics. But there are two aspects to the innovation claim,
10 the innovation conspiracy.

11 Part of the fraud was not to make safer cigarettes.

12 THE COURT: I understand that argument, that they
13 wanted to defraud the public and as part of the fraud they
14 didn't want to come out with safer cigarettes, because if they
15 came out with safer ones it would mean the others weren't
16 dangerous.

17 MR. FITZPATRICK: That's right.

18 THE COURT: That was simple enough even for me to
19 understand as a conspiracy. That's different from the problem
20 of damages.

21 MR. FITZPATRICK: Yes, that's right. Exactly, your
22 Honor, it is a separate issue. It does relate to damages in
23 that the actual conspiracy and the reality of not producing a
24 safer cigarette caused the damage.

25 THE COURT: Let's hold off on that. Is it your

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1 contention that from an evidentiary point of view the
2 conspiracy was to hide from the public the dangers?

3 MR. FITZPATRICK: Yes.

4 THE COURT: And that as part of that conspiracy to
5 hide from the public the dangers, one element of that
6 conspiracy was to put out false information you claim,
7 etcetera, and another part was not to produce safer cigarettes
8 so that people would conclude that the older ones were
9 unsafe?

10 MR. FITZPATRICK: Yes, your Honor.

11 THE COURT: So, from an evidentiary point of view, as
12 I understand it, you're not claiming two conspiracies?

13 MR. FITZPATRICK: From an evidentiary point of view
14 it is one conspiracy. Innovation part is part and parcel of
15 the fraud. For the obvious reason they didn't want to say it
16 was safer because --

17 THE COURT: So, you have one conspiracy, you're
18 claiming, to defraud the public by not leveling with them on
19 the dangers, right?

20 MR. FITZPATRICK: That's right.

21 THE COURT: To put it in the colloquial way.

22 MR. FITZPATRICK: That's right, Judge.
23 THE COURT: Now, when did that conspiracy end?
24 MR. WILLIAMS: That's my point, your Honor. Assuming
25 that they have pled it that way, because, as we indicated in
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1 the papers, then the conspiracy ended in 1986 or 1987 by
2 virtue of the fact that the defendants were out there
3 promoting the safer cigarettes. And, then, with respect to
4 the other evidentiary aspect here, which is the deception of
5 the American public, the sole thing they are talking about in
6 their papers are simply denials of causation or equivocations
7 of causation or addiction, and, quite frankly, your Honor,
8 equivocation does not add up to conspiracy. Under Matsushita,
9 conduct that is equally indicative of independent conduct as
10 conspiracy simply is not evidence of conspiracy. They don't
11 have these evidence of the meetings or anything like that
12 subsequent to, say, 1986 and --

13 THE COURT: Well, they still have your TIRC.

14 MR. WILLIAMS: Of course, your Honor. But the fact
15 that an industry group would have a trade association is
16 hardly under Matsushita something subjective.

17 THE COURT: Go ahead. I'm not cutting you off at
18 all.

19 MR. WILLIAMS: Which is the point that there is still
20 some sort of conspiracy going on because of all the defendants
21 here. One defendant, my client, still refuses to use the word
22 causation to describe the relationship between smoking and
23 disease. And essentially what they're now saying is that the
24 evidence -- there's evidence of the conspiracy because one
25 defendant has not departed with the other defendants. And if

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1 that's a conspiracy, either they are a conspiracy of four or I
2 am a conspiracy all by myself of one.

3 I mean, they are taking this concept of
4 conspiratorial behavior to really absurd lengths. The paper
5 we got today demonstrates this, your Honor. They say as
6 evidence of the conspiracy defendants have yet to come to the
7 market with a product that's actually safer than conventional
8 cigarettes. We would dispute that. But then they go on to
9 say and, one, that poses no health risks to consumers. You
10 are not going to get a cigarette, I don't think, ever, or at
11 least in all our lifetimes that poses no health risks. They
12 were just putting words on the paper. They are just, you
13 know, bringing things out of public statements whether it is
14 indicative of independent action or conspiracy and saying,
15 See, this is a conspiracy.

16 THE COURT: Okay.

17 MR. WILLIAMS: The fact of the matter is they don't
18 have the proof after '86.

19 THE COURT: This is my decision for purposes of this
20 issue at the moment and we'll have to revisit it at the end of
21 the case, I think, but for purposes of admissibility I find
22 that Philip Morris joined the conspiracy as a general
23 conspiracy not to present the public or to mislead the public
24 with respect to health risks of cigarettes and that ended in
25 April 1998, which was the time this case was brought, about

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1 the time that the State Attorney General settlement was being
2 formulated and about the time that through various changes in
3 the Internet publications and other publications there was a
4 softening of the individual defendant's positions showing if
5 not a complete falling out, at least a falling apart.

6 So, Philip Morris is January 1953 to April 1998, so
7 is R.J. Reynolds, so is Brown & Williamson, so is the American
8 Tobacco Company itself or through its successor B&W, so is
9 Lorillard. Liggett Corp. is from January and Liggett and
10 Meyers Tobacco Company is from January 1959 to January 1996.
11 British American Tobacco Company is 1953 to present, B.A.T.
12 Industries TLC is 1976 to present, the Tobacco Industry is
13 January 1958 to January 1999 -- no, no, I'm sorry. It would
14 be to April 1998. It wouldn't go beyond anybody else's. And
15 the Tobacco Industry Research Committee, later named the
16 Council for Tobacco Research U.S.A., December 1953 to November
17 6th, 1998, and Hill and Knowlton from December 1953 to
18 December 1963. The import of that is that any statement made
19 by any of the coconspirators while the coconspirator was a
20 member of the conspiracy and in furtherance of the conspiracy
21 is admissible against all of the coconspirators. As I
22 understand it, that is subject to correction from the
23 parties. That was my position in Falise. Those two joined
24 the conspiracy after the statement and have the statement used
25 against them because they adopted the conspiracy with

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1 essentially its background of these admissions.

2 So, pursuant to Federal Rule of Evidence 801(d)(2), I
3 find that these are statements by a coconspirator of a party
4 during the course and in furtherance of the conspiracy. The
5 contents of the statements shall be considered, but they are
6 not alone sufficient to establish the declarant's authority or
7 the existence of the conspiracy and the participation therein
8 of the declarant and the party against whom the statement is
9 offered under subdivision E. That's the subdivision --

10 MR. WILLIAMS: I understand.

11 THE COURT: -- I'm relying on.

12 I do find that the evidence of this conspiracy is
13 supported by acts independent of these statements of the other
14 coconspirators and of each one of the conspirators themselves,
15 so that the limitation I do not find applies.

16 So, at least we know what evidence we'll have to
17 consider in connection with the motions. My law clerk says I
18 said BATco and B.A.T. Industries up to the present. I meant
19 up to April 1998, obviously. Sorry, I apologize.

20 We have a definite decision now. We can go forward
21 to the motions to dismiss. Is there any dissent from that
22 view? I know you object to the decision and you --

23 MR. WILLIAMS: I mean, essentially, your Honor, my
24 argument is with respect to the motion to dismiss.

25 THE COURT: I understand.

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1 MR. WILLIAMS: I would say --

2 THE COURT: We have to consider what evidence can be
3 used on the motion to dismiss. That's all I've established up
4 to this point.

5 MR. WILLIAMS: Yes.

6 THE COURT: Now we can go ahead and understand what
7 we have involved in considering your motions which I will be

8 happy to hear. Do you want to agree on the ruling on this,
9 the form of it? If you can't or if you want me to issue a
10 ruling, I don't plan to issue an opinion.
11 MR. WILLIAMS: I think we can agree.
12 MR. FITZPATRICK: Yes.
13 THE COURT: Agree on it and submit an order so we'll
14 have something physical before us that can be reargued again
15 at the end of the whole case.
16 MR. FITZPATRICK: Yes, your Honor. We will take the
17 transcript.
18 THE COURT: If I don't grant the motion.
19 MR. WILLIAMS: I think as a ground rule we sort of
20 understood it would be applied throughout the plaintiff's case
21 and I won't go on any longer. I know that the other
22 defendants want a shot at this. But I will say even applying
23 those rules under 801(e), I think, they still don't have any
24 evidence on the conspiracy, particularly with respect to safer
25 cigarette and the health claim issue subsequent to '86 or
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1 '87.
2 THE COURT: So, you're moving to dismiss the entire
3 case, right?
4 MR. WILLIAMS: No.
5 THE COURT: What are you moving for? What relief do
6 you want me to give you at this point?
7 MR. WILLIAMS: We would ask that with respect to
8 liability purposes the conspiracy would be limited to the
9 period 1953 -- is that right -- 1953 to 1986 and that we not
10 be required to put on proof subsequent to that time with
11 respect to the conspiracy. There are other claims in the case
12 that do not relate to the conspiracy.
13 THE COURT: Well, the individual liability would go
14 up to the present, anyway.
15 MR. WILLIAMS: Understood. We have motions to
16 dismiss the entire case, if your Honor would like to hear
17 those.
18 THE COURT: Well, I want to hear the motions.
19 MR. WILLIAMS: Right.
20 THE COURT: If you want to argue them, you can. As I
21 understand the motion to dismiss insofar as it affects
22 conspiracy -- where is that one page I asked you to Xerox?
23 Oh, here it is, all right. -- we have a direct RICO claim.
24 The ambit of the conspiracy is not necessarily affecting that
25 direct RICO claim except insofar as the damages are concerned
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1 with respect to innovation and the like, right?
2 MR. WILLIAMS: With respect to damages?
3 THE COURT: Subrogated RICO payment claim is much in
4 the same position. There is a RICO conspiracy claim which I
5 don't understand myself as a separate claim. I find it
6 difficult to understand how I can explain to the jury what a
7 separate conspiracy claim means in terms of the issue they
8 have to decide, is a defendant liable and for how much? And
9 the same thing is true of the subrogated RICO claim. I find
10 it very difficult to understand that. Maybe that will be
11 explained to me. Then there's a claim for alleged fraud under
12 the common law and that is not affected by a definition of
13 conspiracy at the moment, but perhaps damages, right?
14 MR. GARNICK: That's right, your Honor, yes.

15 THE COURT: Then there is a claim under Section 349
16 and a subrogated claim under 349. I'm not sure, I think there
17 may be a difference with respect to how much can be collected
18 or when they should have known and when they should have paid,
19 so there may be a difference of damages under subrogated and
20 direct, but the definition of conspiracy is not decisive on a
21 motion to dismiss.

22 Am I correct in my understanding of the general
23 situation?

24 MR. GARNICK: Yes, your Honor. We, of course, move
25 to dismiss all the claims on a variety of grounds, but on the
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1 conspiracy issue we're moving directly to dismiss the RICO
2 conspiracy, both subrogated and direct, and then there might
3 be damage issues falling out of that or substantive rulings on
4 conspiracy, but we're not moving to dismiss, for example, the
5 fraud claims on the grounds of no conspiracy. If that
6 addresses the Court's concern.

7 THE COURT: Well, is there a difference in damages
8 under RICO conspiracy and what is it, B and C or D and C?

9 MR. FITZPATRICK: C and D.

10 THE COURT: C and D. Subdivision small C and
11 subdivision small D.

12 MR. GARNICK: We think the measure of damages,
13 whatever that measure properly is, would be the same and we
14 think the notion of conspiracy is kind of inherent in the
15 notion of an enterprise so --

16 THE COURT: The whole thing is very -- the RICO is,
17 of course, very confusing to begin with.

18 MR. GARNICK: Given the number of claims we have in
19 this case which is more than what we have in Falise with
20 direct and subrogated claims --

21 THE COURT: Don't argue that. Let's hear on the
22 conspiracy, why I shouldn't dismiss the conspiracy RICO,
23 direct and subrogated.

24 MR. FITZPATRICK: Your Honor, frankly, we're not
25 concerned with the substantive RICO claim as long as the
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1 conspiracy ruling is applicable to the enterprise claim which
2 I would think it must be. Then, for simplicity sake, in
3 instructing the jury we don't need to claim C -- I'm sorry, we
4 don't need D.

5 THE COURT: I will dismiss the RICO conspiracy direct
6 and subrogated, because if the jury came back and said to me,
7 Judge, what's the difference, I would have to say, I'm sorry,
8 I don't know what the difference is and I hate to be put in
9 that awkward position.

10 MR. FITZPATRICK: That's how I feel right now. I
11 can't tell you that there's a difference.

12 THE COURT: So that's out. That motion is granted.
13 Now we come to the other claims.

14 MR. GARNICK: Your Honor, our grounds for dismissal
15 of the claims can be really divided into two parts. A lot of
16 them are based on arguments that we've made pretrial and your
17 Honor ruled upon. Some of them have been supplemented a bit
18 with the facts that have been admitted into evidence.

19 Where we would like to begin is something I don't
20 think has been touched on at all pretrial and that is the low
21 tar fraud which is a slice of this conspiracy. To the extent

22 that they're saying that defendants engaged in fraud in
23 connection with low tar, we move that that slice of the
24 conspiracy should be out of the case, we shouldn't have to
25 respond to it because they just haven't met their burden, they
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1 haven't submitted the facts. It is a very plain and simple
2 case and that is although there has been conflicting evidence
3 by plaintiff's experts about whether the state of medical
4 science today is such that low tar cigarettes are safer and I
5 think there has been conflicting evidence, there really is no
6 conflicting evidence that as of two years ago the state of
7 medical science was such that low tar cigarettes were safer.
8 When the suit was filed, if you look at the testimony
9 of Dr. Burns, Dr. Harris, Dr. Samet, Dr. Benowitz, they all
10 say that, yeah, 1998 the state of medical science was such
11 that low tar cigarettes were safer based on the epidemiology.
12 Then there was no fraud because that in fact is what the
13 science will show.
14 In fact, Dr. Burns --
15 THE COURT: I didn't think they said based upon the
16 epidemiology. I thought they said based upon the logic of the
17 situation. The epidemiology never showed a sharp drop in, as
18 I recall, in lung cancer after the low tars were introduced.
19 I don't think it was an epidemiological argument.
20 MR. GARNICK: Each one testified based on the
21 epidemiology, the state of epidemiology that smoke -- if you
22 compare smoking low tar cigarettes to smokers of full flavor
23 cigarettes, that the low tar cigarettes would be twenty
24 percent safer.
25 For example, Dr. Samet, Dr. Samet testified that if
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1 you look at any point in time smokers of filtered cigarettes
2 had twenty percent less risk than smokers of non-filtered
3 cigarettes, and he said that's based on the epidemiology.
4 Dr. Burns said that, too. It is only when he took into
5 account his view that when switchers smoked more cigarettes he
6 said the epidemiology effect disappears.
7 Okay. Dr. Harris, when he did his model he was
8 relying upon CPS-1, 1976 study by Hammond, that showed smokers
9 of filtered cigarettes had twenty percent less risk. So, the
10 epidemiology showed that smokers of filtered cigarettes had
11 less risk than smokers of non-filtered cigarettes.
12 Dr. Burns came in and Dr. Burns said that was true
13 maybe in 1998, but there are more recent studies that have
14 changed that and I don't agree with that anymore. Dr. Harris
15 came in and said I believed that in 1998 and 1999, but now I
16 say maybe. Dr. Benowitz said about the same thing. So, let's
17 not argue what is the state of medical science after 1998.
18 Before 1998 every single one of their experts came in
19 and said state of learning, state of epidemiology was that low
20 tar cigarettes were safer. Remember Dr. Samet and we can get
21 the cites, but he had his article from 1996 that says in 1981
22 the Surgeon General said low tar cigarettes were safer.
23 Nothing has changed, I still agree with that. Again, that was
24 based on the epidemiology.
25 Now, what about compensation? Dr. Burns testified
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1 there were two forms of compensation. The first form of
2 compensation which is changes in the way you smoke a
3 cigarette, covering up the ventilation holes or puffing more
4 deeply, he agreed was covered within the epidemiology. The
5 epidemiology inherently takes it into account because the
6 epidemiology tracks how people actually smoke.

7 He says that -- if we can have, Dave, 21.1. I hope
8 this is right. I believe this is Mr. Bleakley's
9 cross-examination.

10 "Fair enough to say there are basically two kinds of
11 compensation, compensation within the cigarette and
12 compensation that is the result of smoking more cigarettes?

13 "Answer: That's correct.

14 "Question: It is, in fact, it is the fact that the
15 epidemiology, the statistical studies that have been conducted
16 and commented upon by people like Dr. Samet say, and they're
17 correct in saying, that they account for the first kind of
18 compensation, right, that within the cigarette?

19 "Answer: They account for that within the cigarette
20 compensation when they control for number of cigarettes per
21 day; that's right."

22 Thank you, Dave.

23 That last line by Dr. Burns leads us to the second
24 form of compensation and it is the second form of compensation
25 that Dr. Burns says is the reason why he's not sure anymore

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1 that low tar cigarettes are safer.

2 Okay. There are two implications of this. First,
3 the epidemiology that science was relying upon before let's
4 use 1998 was valid, irrespective of the first type of
5 compensation. It was valid and reliable and that's what
6 plaintiff's own experts said. They did say that the second
7 form of compensation, smoking more cigarettes, could undermine
8 the epidemiology. But with respect to the second form of
9 compensation, Dr. Burns testified -- on the Elmo -- it is not
10 my position that the internal tobacco industry studies were
11 the bases for demonstrating an increased number of cigarettes
12 smoked per day as part of compensation.

13 Dr. Burns testified that whatever might be in the
14 internal company documents, it was not evidence of second --
15 of the second type of compensation more than what the medical
16 public health communities had.

17 In short, with respect to low tar, we have
18 concessions from the plaintiff's experts that prior to 1998
19 the epidemiology showed that low tar cigarettes were safer and
20 the public health community believed it. We have that the
21 first type of compensation would not affect the applicability
22 or reliability of the epidemiology because the epidemiology
23 inherently takes into account the first form of compensation,
24 whatever level it was; and, three, if the second form of
25 compensation does affect the reliability or applicability of

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1 the epidemiology, plaintiff's experts have not shown, don't
2 take the position that there was anything within the tobacco
3 company files that were specialized knowledge, superior
4 knowledge about the second form of compensation. If the
5 public health community didn't know about the second form of
6 compensation underlying the epidemiology, the tobacco
7 companies did not have that information either.

8 In short, their allegation of fraud pre 1998, okay,
9 is not supported by any evidence that the industry had any
10 reason to disagree with the public health community that low
11 tar cigarettes were not safer.

12 Now, in addition to that basis for knocking out the
13 claim, we also don't think that the low tar slice of their
14 fraud claim is linked to their damage model. Ultimately the
15 only claims that should survive this motion are those that can
16 be linked to damages and can go through Dr. Harris' model.

17 Dr. Harris assumes in his model that low tar
18 cigarettes are safer. He assumes that because in his
19 innovation effect, he assumes that his R factor or the risks
20 of smoking in 1953 are greater than that in 1993. This is
21 from page 3404, Harris' direct testimony.

22 "Dr. Harris, did you, in doing your analysis, come to
23 any conclusion or make any premise regarding whether there had
24 been any improvement in the safety of cigarettes from 1954
25 through the time of your report in 1999?

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1 "Answer: At the time of my report?

2 "Answer: Yes."

3 Notice he's being careful not to say not today but in
4 1999.

5 "At the time of my report, I reached the conclusion
6 that there had been some small improvements in the safety of
7 cigarettes, from 1954 through 1998, although nowhere near as
8 much as you might expect for a decline from 36 milligrams all
9 the way down to 12 milligrams.

10 "Question: Did you base your analysis in part on a
11 review of the literature relating to the impact of low tar,
12 low nicotine cigarettes?

13 "Answer: Yes, I did."

14 Inherent in Dr. Harris' model, whether you want to
15 say it is the innovative effect or the informational effect,
16 is the presumption that low tar cigarettes from 1953 to 1993
17 or today are safer and, so, cigarettes on average have become
18 safer as people smoke -- more often smoke low tar cigarettes.
19 Because of that Dr. Harris didn't mention any kind of fraud
20 about low tar, nor could he have on the stand consistent with
21 his other opinions. Allegations about low tar cigarettes are
22 not caught up, they are not captured in his damage model.
23 He's not measuring the effect if defendants were silent or
24 told the public that low tar cigarettes are not safer, an
25 allegation that would not have been supported before 1998 and

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1 an allegation that goes directly contrary to Dr. Harris'
2 counter factual world where he blames defendants not for
3 telling the public that low tar cigarettes are safer but for
4 not being more aggressive about low tar cigarettes.

5 In short, there's no connection between that slice of
6 the case, low tar cigarettes, and the damage model and,
7 therefore, we ask for a ruling to that effect.

8 We have another related issue that maybe should be
9 handled with this package, and that is we also move for the
10 whole innovation effect of Dr. Harris' model to be thrown
11 out. What Dr. Harris does for his innovation effect is that
12 he calculates his R value, the average risk of cigarettes, in
13 1993, and then he relies upon the epidemiology to assume that
14 his R value would be higher in 1990 -- 1953. So, he has a

15 higher R value in 1953 than in 1993, and then in the counter
16 factual world, he takes this slope, this decline in the risk
17 of R and accelerates it.

18 (Continued on the following page.)

19

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1 MR. GARNICK: (continuing).

2 If there is no decline, if there is no initial
3 decline in R, in the risks of smoking, there is nothing to
4 accelerate and Dr. Harris' calculation of the innovation
5 effect falls apart.

6 Could Dr. Harris could have come up with a different
7 model? Could he have done it some other way, taken the
8 counterfactual world and thought of a new analysis to come out
9 with any different basic numbers? He might well have but he
10 didn't.

11 The evidence in this case, his innovation effects in
12 this case is based upon his testimony that low tar cigarettes
13 are safer and the sale of low tar cigarettes from 1953 to 1993
14 have reduced his R value which he then separates in the
15 counterfactual world, but what does he say about whether low
16 tar cigarettes really are safe? Does he offer an opinion
17 that to a degree of medical certainty that low tar cigarettes
18 are safer to base his model on? No. This is, I think, from
19 Mr. Bleakley's examination question beginning line 17.

20 THE COURT: Give me the page.

21 MR. GARNICK: Yes, page 3676.

22 What I'm giving you the opportunity to do here, Dr.
23 Harris, is to tell us the right answer to that; that is,
24 whether low tar cigarettes are safer. Is it maybe? That is a
25 word you used yesterday. Is the answer maybe --

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1 MR. BLEAKLEY: I'm sorry?

2 MR. GARNICK: Let me start again, what I'm giving
3 you the opportunity to do here, Dr. Harris, is to tell us the
4 right answer to that. Is it maybe? That is a word you used
5 yesterday. Is the answer maybe?

6 "Answer: As of 1998 or 1999, I would say my opinion
7 would have been yes. As of right now, knowing what I know
8 since then, maybe.

9 So the basis for his innovation effect is an opinion
10 maybe it's safer and that is not enough to go to the jury. So
11 we do move that the innovation effect of Dr. Harris's model be
12 dismissed for the remaining 4 claims to which it applies, RICO
13 direct, RICO subrogation, 349 direct, 349 subrogation. We
14 have other arguments but maybe it's best to deal with this as
15 a package.

16 MR. FITZPATRICK: Perhaps we should go back to
17 square 1, your Honor. There is not a separate low tar, we
18 don't have a separate claim, a separate low tar conspiracy.
19 It's part of the overall conspiracy and it involves both the
20 information effect and the innovation effect.

21 For information, let's concentrate on the information

22 effect because the question really isn't is there some benefit
23 from smoking low tar cigarettes, the answer to that is if
24 smokers don't compensate, there is some benefit but that as
25 the evidence is developing tends to show that they compensate
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1 so much that in the real world they are not getting anything.
2 But we don't know.
3 THE COURT: Is your innovation damage issue
4 separable?
5 MR. FITZPATRICK: Yes, it is.
6 THE COURT: I'm going to reserve on that. It's an
7 interesting point.
8 MR. FITZPATRICK: Let me for a moment.
9 THE COURT: You may be out on innovation. I'm not
10 sure.
11 MR. FITZPATRICK: Let me address for a moment,
12 Judge, the issue with the low tar fraud issue because, just so
13 it's clear what we are claiming.
14 What we are claiming is that the tobacco industry
15 misled the public into thinking that there were substantial
16 benefits from switching to light cigarettes which there
17 weren't.
18 THE COURT: I understand that.
19 MR. FITZPATRICK: That is essentially the claim.
20 THE COURT: I understand that position.
21 MR. FITZPATRICK: As to the innovation affect, Dr.
22 Harris's model was not, does not depend upon whether the low
23 tar cigarettes as manufactured and advertised by the
24 defendants in fact had a lower risk or not.
25 THE COURT: I understand that. But the innovation
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1 part is separable, I'll reserve decision on that. On the low
2 tar, I'm going to deny that at this stage. It's too
3 intertwined with the rest of the evidence to strike.
4 MR. GARNICK: Your Honor, the other claims that we
5 have are claims that are based upon arguments that we made to
6 your Honor in the past, supplemented with recent evidence from
7 the trial record and we would rest on our papers with respect
8 to those claims.
9 THE COURT: As I understand the rule, actually I
10 don't have to reserve now even if I deny now, a motion at the
11 end of the case can be made on any issue. They are
12 independent. The rules have all been clarified now.
13 So I'm going to deny it but we'll argue it
14 subsequently after we get the full case is in.
15 But I'm going to let the defendant, I'm going to give
16 the defendants the privilege of putting in their proof on all
17 of these issues, however, they are independent motions by some
18 defendants.
19 MR. McLAUGHLIN: Joseph McLaughlin for B.A.T.
20 Industries.
21 Your Honor, when we were at the this stage in Falise
22 your Honor stated there is no loss to the plaintiffs in
23 dismissing.
24 THE COURT: It wasn't at this stage, it was a later
25 stage when -- did I do it at the end of the plaintiff's case?
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1 MR. McLAUGHLIN: Exactly.
2 THE COURT: I'm not going to do it now because we
3 have everybody here from Great Britain. We didn't have them
4 all in the Falise case.
5 MR. McLAUGHLIN: I think that is all the more reason
6 that you don't need 3 entities from the same corporate
7 family. You have 2 solvent subsidiaries. That was the point
8 in Falise. A, there are no evidentiary problems; and B, there
9 are significant assets here. So there is no problem. In
10 fact, there are more assets here.
11 THE COURT: It really is a great comfort to me to
12 have you here so I'm denying it at this stage.
13 If I go forward with the case and have you in, it's a
14 much simpler case to put with all the defendants here.
15 MR. McLAUGHLIN: Would you like to hear more on
16 this, your Honor?
17 THE COURT: I read your brief but I'd be delighted
18 to listen. I don't want to cut you off but that is my
19 preliminary conclusion.
20 MR. McLAUGHLIN: May I brief some issues?
21 THE COURT: Certainly.
22 MR. McLAUGHLIN: I'd like to review some facts in
23 both the Falise record, and in regard to severance, which is
24 another alternative that your Honor raised in Falise which I
25 think is equally viable.
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1 THE COURT: Severance doesn't make any sense. I'm
2 not going to retry your client. You know that, and I know
3 that. I am not going to have a 10 week trial for one
4 defendant.
5 MR. McLAUGHLIN: B.A.T. Industries did not come into
6 existence until 1976. Half the exhibits admitted in the trial
7 predate B.A.T.'s existence.
8 Plaintiff has contended to you that B.A.T. Industries
9 joined the conspiracy in 1976. That position can't be
10 sustained for the simple reason that there is no proof in this
11 record of any act, any act at all by B.A.T. before 1983 which
12 is 30 years after the inception of the alleged conspiracy.
13 So B.A.T. Industries is the only defendant in this
14 case that did not exist for a large portion and the evidence
15 shows is the linchpin portion --
16 THE COURT: It can join it later, can't it?
17 MR. McLAUGHLIN: It certainly could if there was
18 evidence of that, but I'd like to explain the fact why it was
19 not around for 30 years of the story translates to a failed
20 defect in all of plaintiff's substantive law claims.
21 If you can put up demonstrative 1.
22 Your Honor, this is a quote from the Second Circuit's
23 decision in United States v. Blackmon.
24 You will recall there was quite a bit of discussion
25 about this in Falise.

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1 It stands for the proposition that the defendant who
2 allegedly late joined the conspiracy cannot be retroactively
3 liable for offenses committed prior to its joining the
4 conspiracy.
5 And your Honor used the illustration of a window
6 breaking conspiracy and a late joiner and people whose windows
7 were broken couldn't sue the late joiner for damages caused by

8 a prejoinder of the offenses.

9 I'd like to explain how that is in this case. In
10 Falise plaintiffs are relying on the Harris model to prove
11 cause and effect and damages.

12 Your Honor, I've placed up on the screen.

13 THE COURT: I understand that position but most of
14 the damage that is going to be claimed here occurred after you
15 allegedly joined. If all the smokers had stopped smoking or
16 not started before you joined, there would be no damages here.

17 MR. McLAUGHLIN: 2 points, your Honor.

18 The way the Harris model is set up, it unquestionably
19 includes damages that are solely attributable to alleged
20 substantive law offenses that occurred in their effort before
21 B.A.T. Industries existed.

22 THE COURT: You are entitled to a separate charge on
23 this. I think you are right, the proposition of law is
24 correct.

25 MR. McLAUGHLIN: My point is Harris can't break it
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1 up. It's indivisible so the jury can only speculate. The
2 Supreme Court case law makes clear that juries are not allowed
3 to speculate on damages.

4 THE COURT: They are not allowed to speculate on
5 damages but they are allowed to estimate.

6 MR. McLAUGHLIN: Your Honor raised the situation
7 where there are subscribers who had their entire smoking
8 experience before B.A.T. Industries arrived. Say there are
9 people who both started and quit smoking before 1976.

10 THE COURT: The evidence is overwhelming that if
11 they quit before 1976 and if they were alive during the period
12 when damages can be computed under the statute of limitations,
13 that there would be practically no additional damages due to
14 their prior smoking because their survival for 25 years would
15 have winnowed out all of the really seriously injured and left
16 them in roughly the same position as any other person.

17 So I would think that the jury can deal with this.
18 Make.

19 MR. McLAUGHLIN: I calculated the numbers with
20 respect to the subscriber depositions. We do have 17 percent
21 of them which in real life terms goes into hundreds of
22 thousands of claims. I believe they had their entire smoking
23 experience, that is both started and quit smoking, before
24 B.A.T. Industries came into existence.

25 THE COURT: And does the model depend upon
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1 additional costs for those who quit?

2 MR. McLAUGHLIN: Absolutely, your Honor.

3 THE COURT: And you can compute that as you did.

4 MR. McLAUGHLIN: No, what I'm saying is Harris can't
5 break it out. The way he conducts his MAF or conduct
6 attributable fraction, it begins the year after so somebody
7 who comes in 1976 under his model is going to be -- is
8 breaking the law of Blackmon, holding retroactively liable
9 their latecomer for offenses that occurred entirety before the
10 latecomer came.

11 THE COURT: It's an interesting argument. I'm not
12 sure the jury can't find lesser damages for your client.

13 MR. McLAUGHLIN: I think, your Honor, in order to
14 comply with Blackmon there is really no way they can comply

15 with Blackmon under the Harris model and the same problem
16 applies for both Harris and Mak's models which all that
17 matters to them is when a claim was submitted. They admitted
18 under cross-examination that they can't take into
19 consideration when any subscriber started to smoke so their
20 SAF calculations necessarily are going to include medical
21 expenses based in whole or in part on smoking that occurred
22 before B.A.T. Industries existed.

23 We have another layer of speculation we are asking
24 the jury to deal with. Your Honor is familiar with the
25 successor issue and I submit that there really is no basis
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1 under any existing precedent.

2 To hold the B.A.T. Industries to be the successor to
3 an entity that is in this courtroom, I submit that is another
4 issue the jury is unnecessarily going to have to grapple with,
5 in addition to plaintiffs admit that in order to attribute any
6 acts at all of B&W or BATCo, that plaintiffs would have to
7 satisfy the requirements to pierce the corporate veil and ask
8 the jury to get into the corporate governance issues of
9 complete domination which otherwise would not be involved in
10 this case.

11 THE COURT: I don't see them having to do that. I
12 don't see giving them that instruction. I'll have to consider
13 it when we deal with the instructions.

14 MR. McLAUGHLIN: That was an instruction that
15 your Honor was prepared to give in the Falise case and I think
16 the exact same situation applies here.

17 I'd like to sum up by just reviewing a few of the
18 conspicuous admissions in the evidence against B.A.T.
19 Industries which is to summarize the insufficiency of the
20 record.

21 No live witness testified about B.A.T. Industries.

22 B.A.T. Industries did not publish any advertisement
23 or do any of the research seen by the jury.

24 There is no statement by B.A.T. Industries about low
25 tar cigarettes or evidence that it directed any affiliate to
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1 make such a statement.

2 In fact, one of the exhibits admitted yesterday,
3 8913, says that members of the B.A.T. group cannot participate
4 in campaigns suggesting health benefits of low tar or low
5 nicotine cigarettes. There is no evidence that B.A.T.
6 Industries directed any affiliate to stop safer cigarette
7 research.

8 And finally, as a practical matter, there is a
9 significant amount of the prior testimony that was read to the
10 jury that cannot be attributed to B.A.T. Industries because it
11 wasn't a party to those prior proceedings. Under Rule 32 of
12 the Federal Rules of Procedure, there also needs to be an
13 instruction.

14 THE COURT: I have to give instructions if you
15 remain in when the case goes to the jury with respect to those
16 depositions. You are absolutely correct.

17 MR. McLAUGHLIN: In summation, I don't believe we are
18 any differently situated than we were at this exact juncture
19 in Falise and I urge your Honor to adhere to your prior
20 ruling.

21 THE COURT: I'll reconsider the matter at the end of

22 the total case.
23 Motion denied.
24 MR. McLAUGHLIN: Thank you, your Honor.
25 MR. FEIWUS: Your Honor, Len Feiwus from Liggett.
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1 We also filed a separate motion. I also wanted to
2 address the Court very briefly.
3 THE COURT: I'm not rushing anybody.
4 MR. FEIWUS: Your Honor, I just wanted to address 3
5 quick points. 1 is the evidentiary ruling on conspiracy, 2 is
6 going to be the insufficiency of evidence and 3 is going to be
7 the damages model.
8 With respect to the evidentiary ruling that
9 your Honor just talked about, the problem with Liggett with
10 respect to that issue is that there is -- it's really the
11 second point and the first point wrapped together.
12 There is virtually no evidence in the case concerning
13 Liggett. The only evidence in the contentions that plaintiffs
14 have filed is that Liggett joined the tobacco industry, the
15 Tobacco Institute in 1959 and joined CTR, the successor to
16 TIRC in 1964, stayed until 1968, then was out of the Tobacco
17 Institute by 1994 and that is the only, that is the only piece
18 of evidence that they have submitted as to our membership in
19 this conspiracy.
20 There is nothing else in their contentions and we
21 know that mere membership in a legitimate organization like
22 the Tobacco Institute or CTR by itself is not enough to
23 demonstrate that we were the member of a RICO conspiracy.
24 So the problem is that you have a cart before the
25 horse issue. You say well, the evidence of the conspiracy is
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1 overwhelming as to all of these defendants and Liggett was a
2 member of these organizations so I'm finding that Liggett is a
3 member of the conspiracy for purposes of evidence.
4 And that is the problem. That violates the rule in
5 United States versus Gigante which requires that there be
6 competent evidence as to the particular defendant and that
7 defendant's role in the conspiracy.
8 THE COURT: As I say, that has been embodied in the
9 federal rule now.
10 MR. FEIWUS: Yes, your Honor.
11 THE COURT: But you took the benefit of the
12 conspiracy. You were clearly aware of the conspiracy during
13 all this period and you acted in parallel not because you were
14 taking -- at least that's what could be argued -- an
15 independent parallel view but because you were actually
16 participating knowingly.
17 MR. FEIWUS: We obviously disagree with that but
18 even more important is --
19 THE COURT: Yes, I understand.
20 MR. FEIWUS: More importantly than that, there is no
21 evidence of that in this case. There is a handful of
22 documents in this case concerning Liggett and those documents
23 actually are exculpatory to Liggett.
24 There was a document put in by the plaintiffs, it's a
25 plaintiff's exhibit, it's I believe a B&W document, and I
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1 think the Elmo is on. If we take a look at what it says about
2 Liggett, it's a B&W document reporting on something that was
3 said by Dr. Wakeham.

4 THE COURT: What exhibit number is this?

5 MR. FEIWUS: The exhibit number is 6654,
6 your Honor.

7 And it says that Dr. Wakeham reported that Liggett
8 and Meyers had never been party to the agreement referring to
9 the gentleman's agreement that was discussed by Dr. Farone and
10 is what this document was put in to evidence about.

11 So you have a 1970 document that plaintiffs put into
12 evidence that said that, that attributed a comment to Dr.
13 Wakeham from Phillip Morris, one of my codefendant
14 conspirators, saying I'm not a party to the agreement and I
15 don't see how that helps to establish that I am a member of a
16 purported conspiracy.

17 Similarly, there is another document. It's also --
18 it was also admitted by the plaintiffs in this case. It's a
19 1958 BATCo document. It's the so-called -- the number of this
20 document, your Honor, is 0137 and this, I believe, was read to
21 the jury. I think this was even read on opening statement but
22 certainly put in by plaintiffs. It was referred to in Falise
23 as the trip memo and it says Liggett and Meyers stayed out of
24 the TIRC. That is the predecessor to the CTR originally
25 because they doubted the veracity of the TIRC motives and

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1 believed that the organization was too unwieldy to work
2 efficiently.

3 Liggett felt that the problem was sufficiently
4 serious to justify large scale investment by the company
5 directly in experimental research on smoking and cancer,
6 accepting privately that a strong case against tobacco had
7 been made out and avoiding any public comment until their own
8 research had provided something concrete to offer.

9 This document also shows that Liggett was suspect of
10 the activities of its codefendants and decided to go its own
11 way, take a path independent, and I'm going to introduce a
12 document as I did in Falise that says that it took, that
13 Liggett took a path independent.

14 THE COURT: You'll introduce it and I'll hear you at
15 the end of the case but as of this moment I think they have
16 shown enough.

17 You certainly can present your own documents that
18 show that you were suspicious of the whole operation, you
19 stayed out, then you came in.

20 MR. FEIWUS: What I disagree with is the assertion
21 that we came in because mere membership alone in the Tobacco
22 Institute, that is not evidence that we came into anything.

23 THE COURT: But is it if you knew that they were
24 doing wrong.

25 MR. FEIWUS: Your Honor, that doesn't mean that the
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1 Tobacco Institute was doing wrong. But in any event, your
2 Honor, I just --

3 THE COURT: I'm not saying they were. That is the
4 allegation.

5 MR. FEIWUS: In any event, I think that the, from an
6 evidentiary point of view, what I mean by putting the cart
7 before the horse is by allowing hundreds and hundreds of

8 documents by the codefendants to come into evidence
9 purportedly against Liggett where there are maybe 4 or 5
10 documents about Liggett and to say that whole conspiracy,
11 there is this massive conspiracy and all of these hundreds of
12 documents and all of these dozens of witnesses concerning the
13 codefendants, all that evidence comes in against Liggett is
14 significantly prejudicial when there isn't a prima facie
15 showing that Liggett knowingly agreed to join any kind of
16 conspiracy or participated in any way in the operation,
17 management, control of a RICO enterprise.

18 THE COURT: I find that there was sufficient
19 evidence at this stage subject to argument later.

20 MR. FEIWUS: And my last point with respect to the
21 damage model, I would just state very simply that the same
22 B.A.T. problem with respect to the damages model --

23 THE COURT: It may be right that it is a monolithic
24 model, but it can't be modified with respect to anybody.

25 MR. FEIWUS: It applies with equal force to us. If
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1 the contentions of the plaintiff are correct that we came in
2 in '59 and we are out in '94 or '96, whatever we determine,
3 it's clear that we have the same problem, you have got a
4 period of time where there were substantive violations that
5 are going to be held against us for purposes of damages.

6 THE COURT: It's a good argument.

7 MR. FEIWUS: Thank you. Anybody else wish to be
8 heard tonight?

9 (No verbal response.)

10 THE COURT: Thank you.

11 I really apologize for keeping you so late. I know
12 that it's intolerable but it couldn't avoided.

13 We'll proceed tomorrow with the defendants' case.

14 Good night, everybody.

15 Thank you.

16 Are there any motions on for tomorrow morning?

17 MS. McDEVITT: I don't think so.

18 THE COURT: I think we ought to have a moratorium on
19 letters.

20 MR. FITZPATRICK: No, we don't have anything.

21 THE COURT: Good night.

22 Thank you very much, everybody.

23 (Whereupon, the trial was adjourned until may 3, 2001
24 at 9:50).

25

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1 I N D E X

2 Witness

3 J E R R Y W H I D B Y

4 DIRECT EXAMINATION

5 (Cont'd) BY MR. BLEAKLEY:..... 4751

6 CROSS EXAMINATION

7 BY MR. HEFTER:..... 4824

8 REDIRECT EXAMINATION

9 BY MR. BLEAKLEY: 4902

10 RECROSS-EXAMINATION

11 BY MR. HEFTER: 4910

12

13 P E T E R E N G L I S H

14 DIRECT EXAMINATION

15 BY MR. GARNICK: 4911
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1 E X H I B I T S
2 Plaintiff For Identification In Evidence
3 PTX9896..... 4837
4 PTX9897..... 4841
5 9898..... 4843
6 9784..... 4846
7 demonstrative 301..... 4926
8 PTX 935 in evidence.)..... 4865
9 PTX 935 in evidence.)..... 4865
10
11
12
13 Defendant For Identification In Evidence
14 Defendants' Exhibit BCD 998..... 4753
15 Defendants' Exhibit 31344..... 4756
16 Defendants' Exhibit 1852..... 4761
17 Defendant's Exhibit BCD 258..... 4815
18 Defendant's Exhibit 1420..... 4933
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